



REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

EASTERN DISTRICT:
NEW-ORLEANS, DECEMBER, 1833.

THE EXECUTORS OF HART vs. BONI, F. W. C.

EASTERN Dis.
December, 1833.

APPEAL FROM THE COURT OF THE PARISH AND CITY OF NEW-ORLEANS.

THE EXECUTORS OF HART
vs.

Where seizure is given by the will to the executor, he is authorised to bring an action to recover the possession of any property which may have belonged to the testator at his death.

BONI, F. W. C.

This right of the executor exists, and the action does not abate where the possessor asserts title in himself, the validity of which title can only be ascertained by trial.

In a suit by the executor to recover the deceased's property, the heirs if interested and present, or if absent, then their representatives, should be made parties to the action.

The petition alleged that the defendant had lived in concubinage with the testator; that she had in her possession and claimed to own, certain notes belonging to the succession,

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amounting to one hundred and twenty-three thousand four hundred and fifty-one dollars and fifty cents; that the said notes were deposited in bank to the joint order of the two parties, to await the decision of a competent court on the right of ownership. It further averred that a certain pretended donation, *inter vivos*, was illegal and void. They prayed that the donation might be declared null, and the notes be decreed to belong to the succession.

The defendant excepted that the executors had no right to bring an action to set aside a donation made by their testator, and averred that such right could be exercised only by the heirs and legatees under the will. They also, afterwards, excepted that Brocke, one of the plaintiffs, had died since their first exception was filed, and his co-executors having been appointed merely to aid him, could not prosecute the action. The death of Brocke was admitted of record.

The will contained the following clause: "I do also appoint the said James Ramsay, William Brocke and James Hopkins, to be detainers of my estate, jointly or separately, with powers to take possession and inventory thereof without intervention of justice." It also declared, that "when they, the said James Ramsay, William Brocke and James Hopkins, shall have liquidated and settled the accounts of my estate in this place, it is my will that they do account to, and settle with William Brocke, one of the aforesaid executors." It then provides, that on such settlement and payment into Brocke's hands, the functions of his co-executors shall cease.

The judge, *a quo*, sustained the first exception, and the plaintiffs appealed.

Pearce, for plaintiffs and appellants contended,

That the executors have a right to institute suits for the recovery of any personal property, unlawfully detained from the estate of the testator.

Mazureau and Slidell, for defendants and appellees.

The counsel, however, has not been fortunate enough to discover positive authorities in support of his opposition. Those which he has adduced from the common law, are respectable and cogent. 2 *Williams on Executors*, 614 and 615. 4. *Kent's Com.* 2d edition, 124 and 130. 3. *Comyn's Digest*, 101, 113, and 124. The principle these authorities establish is that such a restricting clause cannot protect the property of an individual when justice requires it to be turned into cash to satisfy the claims of third parties, as in cases of a cession of goods, or for the liquidation of a succession. The district judge has admitted the authorities of the decisions which support the opinions of these able common law writers, was not binding on him. He has deemed it his duty to compare this restricting clause strictly in obedience to the article of our code, which recognises it 2696, and it does not appear to us he has erred in his endeavor to give it that strict consideration which the legislator imperiously demanded when he restricted the clauses to the voluntary transfer and abandonment, made by the lessee himself, leaving third parties, such as creditors and legatees, the faculty of exercising any right they might have on the lessee.

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December, 1832.

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If the lessee by express stipulation in the contract of lease be prohibited from the transferring the lease to a third person without the lessor's written consent. This restriction does not apply in case of the assignment by the lessee's executor, & the executor may transfer the lease even against the lessee's will.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Peirce and Benjamin, for plaintiff and appellant then moved for a rehearing on the following grounds:

1. Every one of the common law authorities cited by defendant, decides the question now submitted to the court upon technical reasons unknown to our jurisprudence, and upon principles directly the reverse of those established by our law. All those writers declare that the executor is not bound by the restricting clause "because not named in it." But the *Civil Code of Louisiana*, art. 2003, establishes the opposite principle, which of course must lead to a result directly opposed to that of the common law writers. That art. of the code says, that "heritable obligations and stipu-

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amounting to one hundred and twenty-three thousand four hundred and fifty-one dollars and fifty cents; that the said notes were deposited in bank to the joint order of the two parties, to await the decision of a competent court on the right of ownership. It further averred that a certain pretended donation, *inter vivos*, was illegal and void. They prayed that the donation might be declared null, and the notes be decreed to belong to the succession.

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The judge, *a quo*, sustained the first exception, and the plaintiffs appealed.

Pierce, for plaintiffs and appellants contended,

That the executors have a right to institute suits for the recovery of any personal property, unlawfully detained from the estate of the testator.

Mazureau and Slidell, for defendants and appellees.



PORTER, J., delivered the opinion of the court.

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This case presents for decision the question, whether the executors of a will can maintain an action to annul a donation, *inter vivos*, made by the testator. The court of the first instance was of opinion they could not, and the plaintiffs appealed.

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It has been contended that as the testator gave to the executors seizure of the estate, they are entitled to the possession of it, and that they are consequently authorised to bring an action to obtain that possession. It is urged on the other side, that however true this may be as a general proposition, it is not so when the question as to the validity of a donation, grows out of the claim which the executors set up, or is presented by the pleadings.

We think the executors, where seizure is given to them by the will, are authorised to bring an action to recover the possession of any property which may have belonged to the testator at his death. The article 1669 of the *Louisiana Code*, recognize their right to bring actions on behalf of the succession, and we cannot imagine a case in which this right could be more properly exercised, then where the object of the suit is to obtain possession of effects making a part of the estate. The question then is, whether the assertion of title on behalf of the possessor, the truth and validity of which cannot be ascertained, until after trial shall deprive them of this right. If it can, it is very clear that the authority we have just supposed they possess, would be a mere illusion, for the claim would be set up in all cases where the possessor was in bad faith.

Where seizure is given by the will to the executor, he is authorised to bring an action to recover the possession of any property which may have belonged to the testator at his death.

We therefore, think, that in such cases the action should should not abate. If a claim be set up which involves the rights of the heirs or legatees, they should, if present, be made parties to the suit; and if absent, their representatives should be brought in. In countries having laws in no material respect different from ours on this subject, it is held, that although executors cannot alone maintain an action in relation to the rights of heirs, they may, if those who are

This right of the executor exists, and the action does not abate where the possessor asserts title in himself, the validity of which can only be ascertained by trial.

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interested are made parties to the suit. See *Merlins Répertoire*, ed. 1826. *Verbo Exécuteur Testamentaire*, Nos. 6 and 7.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and it is further ordered and decreed, that the execution filed in this cause be overruled; that the case be remanded to be proceeded in according to law, and that the appellee pay the costs of this appeal.

BARRON vs. DUNCAN, EXECUTOR, ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

If the lessee by express stipulation in the contract of lease, be prohibited from transferring the lease to a third person without the lessor's written consent, this restriction does not apply in case of the assignment by the lessee's executor, and the executor may transfer the lease even against the lessor's will.

This case commenced by injunction. Thomas Barron, on the 31st January, 1832, by public act leased to the late Mary Carroll, for the term of seven years, to be computed from the 1st of November, 1831, a house situated on the north side of Canal street, in the city of New-Orleans, designated as No. 48, in consideration of rents specified in said act. One of the conditions named in the lease was "that the said lessee should not transfer and abandon the present lease to any other person whomsoever, without the consent in writing of the lessor."

The lessee has since died, and L. C. Duncan, one of the defendants, is sued as her executor. The plaintiff complains that the executor has taken steps to sell the lease at auction

without his consent in writing, against his will expressed to the executor, and in violation of the clause of the lease recited. He prayed an injunction to restrain the proceedings to sell the lease, and made the attorney for the absent heirs a co-defendant.

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The executor answered, that the restriction contained in the above recited clause, did not bind him and that he might alienate the lease. The attorney for the absent heirs joined in this defence.

In their amended answer they alleged that the lease should be sold, because the executor could not then ascertain the solvency of the estate of the deceased, and because she had made valuable improvements on the building.

It was admitted that the executor had duly received his letters testamentary; and that the attorney for the absent heirs had been duly appointed; that the appraised value of the estate, according to the inventory, amounted to ten thousand seven hundred and sixty-five dollars and twenty-nine cents, including one thousand five hundred dollars as the value of the lease; that three thousand three hundred and seventy-nine dollars had been received by the executor according to the accounts; that he had paid one thousand eight hundred and eighty-two dollars and seventy-one cents, including five hundred and twenty-five dollars paid to the plaintiff for the rent of two quarters of the leased property; that the executor had then in his hands in cash the sum of one thousand four hundred and ninety-six dollars and thirty cents; that claims against the estate exceeding one thousand dollars had been presented; that there was owing to the estate two thousand two hundred and five dollars and thirty-five cents; and that books mentioned in the inventory amounting to three thousand dollars have been returned to their owners.

The judge *a quo* dissolved the injunction with costs to the plaintiff. He appealed.

The cause came on to be heard in an assignment of error on the face of the record, on the ground of error in the decision of the judge *a quo*, that the lease was assignable.

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Peirce and Benjamin, for plaintiff and appellant.

1. The lease was personal, and consequently ceased by the death of lessee. *Civil Code, 1194.*

2. Or it is heritable, and in such case the restriction descends on the executor's as well as the right to the lease itself. *Civil Code, 2003.*

L. C. Duncan, contra.

1. An executor has a right to assign a lease, notwithstanding a clause in the lease restraining the immediate lessee from alienation, *the executor not being named.* 2. *William's Executors, p. p. 614, 615.* 4. *Kent's Com. 2nd edition, p. 124 and 130.* 3. *Comyn's Digest, pages 101, 113, and 128.*

2. The right in this lease is heritable, and therefore to pay debts and discharge legacies, the executor is bound to sell. *Civil Code, arts. 1993, 1994.*

MARTIN, J., delivered the opinion of the court.

The plaintiff and appellant complains of a judgment dissolving an injunction to prevent the defendant from proceeding to the sale of a lease granted by him, the plaintiff, to the defendant's testatrix, which contains a clause restraining her from transferring and abandoning the premises to any person whomsoever, without the consent of the lessor in writing.

His counsel has contended that the court erred because the lease was a personal one. *Civil Code, 1994,* and as it was an heritable one it descended with the restricting clause, 2003.

On the part of the appellee it has been replied, that a lease makes part of the estate of the lessee, and as such may and must be sold by his executors to pay the debts and legacies; and that this even is the case when the lease contains a clause restraining the lessee in the faculty of alienating to cases in which he may obtain the consent of the lessor.

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The counsel, however, has not been fortunate enough to discover positive authorities in support of his opposition. Those which he has adduced from the common law, are respectable and cogent. 2 *Williams on Executors*, 614 and 615. 4. *Kent's Com.* 2d edition, 124 and 130. 3. *Comyn's Digest*, 101, 113, and 124. The principle these authorities establish is that such a restricting clause cannot protect the property of an individual when justice requires it to be turned into cash to satisfy the claims of third parties, as in cases of a cession of goods, or for the liquidation of a succession. The district judge has admitted the authorities of the decisions which support the opinions of these able common law writers, was not binding on him. He has deemed it his duty to compare this restricting clause strictly in obedience to the article of our code, which recognises it 2696, and it does not appear to us he has erred in his endeavor to give it that strict consideration which the legislator imperiously demanded when he restricted the clauses to the voluntary transfer and abandonment, made by the lessee himself, leaving third parties, such as creditors and legatees, the faculty of exercising any right they might have on the lessee.

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December, 1872.

HARRISON
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EXECUTOR
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If the lessee by express stipulation in the contract of lease be prohibited from the transferring the lease to a third person without the lessor's written consent. This restriction does not apply in case of the assignment by the lessee's executor, & the executor may transfer the lease even against the lessee's will.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Peirce and Benjamin, for plaintiff and appellant then moved for a rehearing on the following grounds:

1. Every one of the common law authorities cited by defendant, decides the question now submitted to the court upon technical reasons unknown to our jurisprudence, and upon principles directly the reverse of those established by our law. All those writers declare that the executor is not bound by the restricting clause "because not named in it." But the *Civil Code of Louisiana*, art. 2003, establishes the opposite principle, which of course must lead to a result directly opposed to that of the common law writers. That art. of the code says, that "heritable obligations and stipu-

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lations impose on heirs, assigns, and *other representatives* the same duties and rights that the original parties were liable to."

2. But the court says in its judgment, that the *art. 2697, of Civ'l Code*, requires the clause to be strictly construed. True, therefore, if the expressions contained in the act were of doubtful import, if they were susceptible of more than one interpretation, it would be the duty of the court to lean towards that construction which would most favor the free disposal of property; but where, as in the present case, there cannot be a shadow of doubt as to the real intention of the parties, where the whole tenor of the instrument shows that they intended that lessor should control the alienation of the lease, as they might deem proper. Surely the strict construction required by the legislature, cannot be such a construction as would render nugatory the clause introduced for his protection and authorise the court to depart from the great principle of justice sanctioned in *art. 1940, Civil Code*, that the intent of the parties to an agreement has the *effect of law* between them.

3. The court decides that executor may alienate although deceased could not; are not the powers of the executor derived from deceased? Is he not her mandatory? And can a party grant more right to a power than he himself possesses. Again, during the life of testatrix, lessor had the right of controlling the alienation of the lease; can her death abridge or effect his rights without an express consent to that effect?

4. The court says again, that the rights of third persons such as creditors and legatees cannot be effected by this clause. The appellant believes the court to be in error in relation to the facts. The only evidence on file in the cause, shows that after paying all claims against the estate, and making every allowance for bad debts, there exists in favor of the estate, a nett surplus exclusive of this lease of seven thousand four hundred and seventy-four dollars. The rights of creditors then cannot possibly be compromised by any decision given in the cause, and there is nothing to show

that any legacies have been made by testatrix. But admitting that she has bequeathed a sum exceeding this surplus, she has bequeathed what did not belong to her, and the appellant is ignorant of any rule of law or equity which obliges him to make up the deficiency.

The motion for a rehearing was overruled.

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MELANCON'S WIDOW vs. HIS EXECUTOR ET AL.

APPEAL FROM THE COURT OF PROBATES OF THE PARISH OF ASCENSION.

Where the husband died worth five thousand dollars, having bequeathed to his widow a slave and child, and the heirs having abandoned to her the household furniture, held she was entitled to the marital portion.

A legacy made by the husband to his wife, must be deducted from the amount of the marital portion to which she may be entitled.

Narcisse Landry, as testamentary executor of the late Paulin Melançon, rendered his account to the Court of Probates for the parish of Ascension, praying that all parties interested might be cited, that his account might be homologated, the payments be made in accordance therewith, and he be discharged.

Adelaïde Denous, widow of the testator, opposed the homologation of the account, because she had not been placed thereon for the fourth of the testator's property; she having brought no dowry, and he having died rich and childless, leaving her in necessitous circumstances.

The executor denied that the testator had died rich, leaving her in necessitous circumstances, and required of the widow strict proof of these allegations.

The heirs joined in this denial, averred that if she had been entitled to the marital portion, she had forfeited that

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right by improper conduct, and pleaded that if she were still entitled to it, there should be deducted whatever she had received from the decedent by legacy or otherwise.

Babin testified that the widow brought no dowry to the marriage. On her husband's death she had the means of living, that the moveable property of the community, which the heirs had left to her; was worth at least one hundred and fifty dollars. She had then no separate property. The negro woman and child bequeathed her were worth one thousand dollars, and could be hired out for ten dollars per month. Thinks a woman could live there for one hundred and twenty dollars a year. She lived better after than before her husband's death. The testimony of *Babin* was confirmed in the main by that of *Gaudin*.

The opponent offered in evidence the certificate of her marriage with the testator, a copy of the testament, the account filed, and the inventory and *procès verbal* of the community property.

The judge *a quo* decided the widow was entitled to the portion as claimed, but deducted therefrom the amount of the testator's legacy to her. She had judgement for the balance two hundred and twenty-one dollars and twenty-five cents.

She appealed. The appellees prayed the rejection of her demand for the marital portion.

Nicholls and *Isley*, for opponent and appellant.

1. The testimony shows the widow is in indigent circumstances, and is therefore entitled to the marital portion.

2. The judge *a quo* erred, in deducting the amount of the legacy to the wife.

3. By article 2359 of *Civil Code*, the wife is entitled to this portion, when the husband dies rich, she being in indigent circumstances. This portion consists of the fourth of the succession, in full property, where there are no children. So far the article is a substantive enactment, and is strictly applicable to appellant's case.

4. In the case of children, whose interest it was the policy of the law to protect this portion, it is justly modified and reduced. This latter member of the article has no connection with the first, as shown by its punctuation, and from the propriety and justice of such distinction.

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5. The construction contended for by appellants is strictly in accordance with the principles of justice. In case of children, their interest is protected; in case of none, the person, whom the deceased would have selected, could his will have been consulted.

6. The fact of the widow being in necessitous circumstances, must be confined to the moment the succession was opened by the death of her husband. Her rights accrued *eo instanti*, and no subsequent liberality of the heirs and other circumstances could destroy her *vested* rights.

Seghers, contra.

1. The widow Paulin Melançon, is not entitled to the marital portion, unless she was left in *necessitous circumstances*, and her husband died rich. *La. Code, art. 2359.*

The evidence in this case, does not show either of those facts. The succession left by the husband, as appears from the account thereof, is inconsiderable. At the death of her husband, or immediately after the widow had the means of living, and did live, as comfortably as whilst her husband was living, and in the same condition of life, as before her husband's death. She was in possession of a house, the slaves, bequeathed to her by her husband, and the same household furniture she owned in his life time. By her industry, both after her husband's death, she contrived to procure such commodities of life as she desired, in addition to what she strictly needed for her support. The evidence further shows, that the condition in life of both the husband and wife, was that of *poor planters*, obliged to support themselves, by personal manual labor, and that with respect to the condition of herself and her husband, when *both living* together she cannot be said to have been left in *necessitous*

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circumstances, at his death. What might have been *necessitous circumstances* in the case of a lady born in wealth and affluence, and whose husband should have been a man of a high rank in life, and a man of fortune cannot be considered as such, in the case actually before the court.

The article 2359 of the *La. Code*, is taken from Spanish law on the subject, and originally from the *Novellæ of Justinian*, and the *Authentica Præterea, ea. C. unde vir et uxor*, in the Roman law. The intention of the law is evidently that the widow should enjoy, after the death of her husband, a rank and condition in life, suitable to her former estate. The reasons of the law are perfectly explained in the *Répertoire de Jurisprudence, Merlin, Verbo, Quarte de Conjoint Pauvre. No. 1.* See also *Encyclopédie de Jurisprudence. Verbo, Quarte de Conjoint Pauvre.*

To entitle the widow to the marital portion, she must be after her husband's death, *actually in necessitous circumstances*, considering her former condition of life. See *ibid.*, *Merlin and Encyclopédie Méthodique. Febrero*, commenting on the Spanish law, which was derived from the same source, goes further, and says: *Part. 1, chap. 1, sec. 9*, "quando las mugeres siudas quedan tanpobres, que nada tienen, con que alimentarse, y sus hijos Ricos, por haber heredado de sus padres mucha hacienda, pueden llevar la quarta parte de los bienes paternos, que sus hijos deben heredar. *Leg. 7, tit. 13, Partida, 6.*

2. If the widow be entitled to the marital portion, she is bound to include in that portion, what has been left to her as a legacy, by her husband.

The article 2359th of the *La. Code*, "IN FINE," is express on that point, and if there can be any doubt on the meaning of the law, arising from ambiguity in the wording or in the punctuation, that meaning must be gathered from the whole tenor of the law, and the evident intention thereof. *Incivile est, nisi tota prespecta, una aliqua particula ejus proposita, judicare vel respondere. L. 24, ff. De legb. Verbum ex legibus, sic accipendum est, tam ex legum sententiâ, quam ex verbis, L. 6, sec. 1, ff. de Verb. signu. Etsi maxime verba legis hunc habent intellectum, tamen Meus legislatoris, aliud vult. L. 13,*

sec. 2, ff. de excus. tutor. Donat, says: "Pour bien entendre le sens d'une loi, il faut en peser tous les termes et le préambule, lorsqu'il y en a, afin de juger de ses dispositions par ses motifs, et par toute la suite de ce qu'elle ordonne, et ne pas borner son sens, à ce qui pourrait paraître différent de son intention, ou dans une partie de la loi tronquée, ou dans le défaut d'une expression. Mais il faut préférer à ce sens étranger d'une expression défectueuse, celui qui paraît d'ailleurs évident, par l'esprit de la loi entière. Ainsi c'est blesser les règles et l'esprit des lois, que de se servir, ou pour juger, ou pour conseiller, d'une partie détachée d'une loi, et détournée à un autre sens, que celui que lui donne sa liaison au tout. Domat, *Lois Civiles*, livre *prelim.* tit. 1, sec. 2, sec. 10. See also, *Traité des Lois*, chap. 12, paragraphes 7, 8 et 9.

"Il s'ensuit de cette remarque de l'esprit de la loi et de son motif, que s'il arrive que quelques termes, ou quelques expressions d'une loi paraissent avoir un sens différent de celui qui est d'ailleurs évidemment marqué par la teneur de la loi entière; il faut s'arrêter à ce vrai sens et rejeter l'autre qui paraît dans les termes, et qui se trouve contraire à l'intention. Il s'ensuit encore, que lorsque les expressions des lois sont défectueuses, il faut y suppléer pour en remplir le sens selon leur esprit."

That the intention of the law, is that in every case the survivor is bound to include in the marital portion, whatever has been left to him as a legacy by the husband or wife who dies first," is evident from the fact, that, were it not so, the wife might very often claim and receive the greater part of the succession of her husband, should he die without children, and she happened to have brought no dowry for she might receive in particular legacies, property to the amount of one half of his estate or of a quarter proportion thereof, which added to the marital portion, one fourth, would give her three-fourths, or a still greater part of the succession. In all the different cases, decided in France, in the provinces governed by the Roman law, prior to their repeal, which cases are found in *Merlin, Répertoire de Jurisprudence*, Verbo, *Quarte de Conjoint Pauvre*, it was held, that the wife claiming the marital portion, was

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bound to include therein whatever had been received from the predeceased husband by legacy, or otherwise. See No. 2. *Verbo. Quarte de Conjoint Pauvre, Merlin.*

MARTIN, J., delivered the opinion of the court.

The widow complains of the judgment before us, because the court compelled her to suffer the deduction of a legacy left to her by her husband, from the marital portion of his estate, to which she successfully urged her claim. The executor complains of the judgment also, because it supports the claim to the marital portion.

As if this court be of opinion that the marital portion ought not to have been allowed, it will not be necessary to inquire whether the legacy was properly deducted, it is best to examine at first, the validity of the claim to the marital portion.

It is grounded on the *La. Code*, 2359, and it is resisted on the absence of evidence, in regard to two essential facts, viz: that her husband died *rich*, and that he left her in *necessitous circumstances*.

On these two questions no one could possess better information, than the judge of Probates, who made the inventory and presided at the settlement of the estate. It appears that after the payment of all the debts, there was a sum of upwards of five thousand dollars for the heirs. The wife brought no dowry, and at her husband's death had no separate property. The terms *rich* and *necessitous circumstances*, are to be taken relatively. If the husband leaves five thousand dollars clear of debts, and the wife has no special property, then the Court of Probates may correctly assume that the husband died *rich*, because he was so if compared with the wife, and she in *necessitous circumstances*, having nothing, if compared with the husband. It is true two witnesses think that as the husband left to the wife by will a female slave and child, and the heirs abandoned to her the household furniture, she might support herself by her labor and that of these slaves; but the slaves may die or other-

When the husband died worth 5000 dollars, having bequeathed to his widow a slave and child, and the heirs having abandoned to her; the household furniture, held she was entitled to the marital portion.

wise become useless, and her services insufficient. It appears to us the court did not err in supporting the claim to the marital portion.

This leads us to the examination of the obligation of the wife to suffer a deduction of the amount of the legacy, valued at one thousand dollars from her marital portion.

In this we concur also with the Court of Probates. If a husband leaves to his wife nominatively one fourth of his estate, she certainly may not claim one half *i. e.* one fourth for the legacy, and one fourth for the marital portion. If he leaves her an annuity sufficient to enable her to live in the same style as to comfort, and elegance as persons of her rank live in; then she is not left in *necessitous circumstances*, so if she have the means of doing so, independently of her husband.

When the husband is rich and the wife in *necessitous circumstances*, whatever he leaves by his will be considered by the courts, as left in compliance with his obligation to leave her one fourth of his estate,

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed with costs.

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December, 1833.

PLAUCHE
ET AL.
VS.
MARIGNY.

A legacy made by the husband to his wife, must be deducted from the amount of the marital portion, to which she may be entitled.

PLAUCHE ET AL. vs. MARIGNY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

On a motion to dismiss an appeal, the mover is not required to state any of his reasons for the purpose of obtaining an order on his adversary to show cause; and if some of the causes have been expressed, the mover is not thereby precluded from alleging others on the trial.

The want of citation of the appellee, for the term at which the appeal is made returnable, is a good ground for dismissal of the appeal.

EASTERN DIST. The sickness of the judge *a quo*, cannot excuse the want of citation in due December, 1833.

**PLAUCHE
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MARIGNY.**

time, it being a writ in the ordinary course of judicial proceedings, requiring no special order of the judge.

The citation of the appellee cannot be proved, as a matter *in pais*, it must appear as a matter of record, or at least must be established by the written acknowledgment of the party.

Mrs. Faure, formerly the wife of the late Toussaint Letourneau, and their only child and heir, Emilie Letourneau, brought this action to be quieted in their title to a tract of land, measuring sixteen arpents on lake Pontchartrain, at the mouth of bayou Castin, by forty arpents in depth.

The petition showed that on the 13th of February, 1790, Joseph Rabassa, since deceased, obtained from governor Miro, a grant for a tract of land on lake Pontchartrain, and on Castin bayou, measuring thirty arpents in front, by forty arpents in depth. Copies of Rabassa's *requête* and the governor's order of survey, made in conformity with it, were produced. By the *requête*, the tract solicited was bounded on one side by the land of Joseph Laurent, an error it was alleged, induced by the belief that Laurent was the actual owner of the small tract which he then cultivated. Rabassa took immediate possession of the land, and retained it peaceably until 7th January, 1805, when he sold the land to Toussaint Letourneau, and delivered to him the *requête* and order of survey. Letourneau's possession was uninterrupted. In April, 1820, his title was confirmed by the commissioners of the United States for the district, east of the island of New Orleans. He died in the same year. Since his death the plaintiffs aver their possession has been peaceable until October, 1829, when the defendant claimed that part of the tract for which this suit is brought; planted posts as boundaries on it; cut and destroyed large quantities of wood and timber, and exercised many other acts of pretended ownership.

The defendant pleaded the general denial to all these allegations. He denied that the concession to Rabassa was

valid, because, as he alleged, it was not followed by actual survey. He denied that the alleged confirmation by the commissioners of the United States, had any effect on his title. He pleaded a better title, and the prescription, by uninterrupted, *bona fide* possession, of ten, twenty and thirty years. The title under which the defendant claimed the *locus in quo*, was a British grant made to Lewis Davis in 1777.

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December, 1833.

PLAUCHÉ
VS.
MARIONT.

The judge *a quo* decided against the plaintiffs' claim, on the ground that the plaintiffs had not shown with sufficient certainty, that the land in dispute was included in the tract granted to Rabassa.

The plaintiffs appealed.

On the 7th of May, 1833, judgment was signed by the late Judge Lewis, the then presiding judge. On the 15th of the same month, the same judge granted the order of appeal, returnable on the first Monday in the following month. The appeal bond was filed on the same day. On the 20th of November, following, a second petition of appeal was presented, stating that Judge Lewis had not attended court, by reason of his illness and death, subsequent to the day when the order of appeal was granted. His successor in office, thereupon, made the following order. "The judge of this court not having tried this cause in the first instance, cannot give the certificate required by the plaintiffs, and there not being time for the return of this appeal in the present month, it is ordered the said appeal be made returnable on the first Monday in December next."

The clerk of the court certified "that the foregoing two hundred and three pages, do contain a transcript of the record for appeal in the case wherein," &c.

On the transcript was endorsed the following admission of service, and signed by the attorney for the defendant and appellee. "*Service of this appeal acknowledged by me this 19th November, 1833.*"

The record was filed on the 2d of December, 1833.

The cause came on to be heard, on a motion to dismiss the appeal, for want of a statement of facts and omission to file the transcript of the record on the return day.

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December, 1833.

MATHEWS, J., delivered the opinion of the court.

PLAUGHE
ET AL.
VS.
MARIORY.

This case was brought before the court on a motion to dismiss the appeal. It is expressed in the following terms. "On motion, &c., it is ordered that the plaintiffs and appellants show cause, &c., why this appeal should not be dismissed, there being no statement of facts, and not having been returned on the return day."

In the course of argument the counsel for the appellee offered as an additional reason, why the appeal should not be dismissed, the want of citation after the appeal to the proper term of the Appellate Court. This mode of argument is objected to by the appellants, as inadmissible, insisting that the mover should not be permitted to avail himself of any means to dismiss, except those contained in his motion. We

On a motion to dismiss an appeal, the mover is not required to state any of his reasons for the purpose of obtaining an order, on his adversary to show cause; and if some of the causes have been expressed, the mover is not thereby precluded from alleging others on the trial.

are, however, of a different opinion. When a motion is made to dismiss an appeal, it is not required of the mover to state any reasons for the purpose of obtaining an order on his adversary to show cause. He would consequently be at liberty to show any legal causes of dismissal, *ore tenus*, on the trial of the rule, and it seems to us to follow, as a corollary, that if all reasons to dismiss may be offered on the discussion of the rule, without having been expressed in it, the circumstance of some having been thus expressed, cannot lawfully preclude the adduction of others.

The want of citation of the appellee, for the term at which the appeal is made returnable, is a good ground for dismissal of the appeal.

The article of the *Code of Practice*, 583, relied on by the appellee's counsel, to show the fatal effect of the want of citation to the proper term of the Appellate Court, has in several instances received our interpretation and the text of law itself, as well as the decisions of the court, all favor his pretensions.

In the present instance, the petition of appeal was filed in May last, and the order of the court below made it returnable to the first Monday in June term, of the Appellate Court. To appear on that day, the appellee ought to have been cited, if there was time sufficient after the rendition of the judgment in the District Court, in pursuance of the delay allowed by law, if not to the first day of the next succeeding term. The record affords no evidence, *pro* or *con*, as to this

sufficiency of time to make the appeal returnable to the term of the Supreme Court, immediately succeeding the signing of the judgment in the court below; but as it was made thus returnable, the fair presumption is, that the time was sufficient. Being of opinion, that on this ground alone the appeal must be dismissed, we forbear to examine any other point in the cause.

The circumstance of the sickness of the judge *a quo*, as detailed in the affidavit of Mr. Farrie, cannot excuse the want of citation in due time, being a writ in the ordinary course of judicial proceedings, requiring no special order of the judge. See in support of this opinion, 3 *La. Reports* 440, 460 and 250. 4 *ditto* p. 180. and *Code of Practice* 583.

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The sickness of the judge *a quo*, cannot excuse the want of citation in due time, it being a writ in the ordinary course of judicial proceedings, requiring no special order of the judge.

It is, therefore, ordered, adjudged and decreed, that this appeal be dismissed at the costs of the appellants.

Conrad and Potts, for plaintiffs and appellants.

Hennen, contra.

A rehearing was prayed for by the appellants, on the ground that the want of citation for which the appeal was dismissed, had not been stated among the causes for dismissal filed, and that the appellants were prepared to prove that the service of the citation of appeal had been expressly waived by the appellee in person. The rehearing was granted.

The appellants relied on the following affidavits which they offered in evidence.

John L. Lewis, the clerk of the court in which the cause was tried, made affidavit "that B. Marigny, the defendant in the above entitled suit, appeared at this affiant's office a short time after the appeal in this case was taken, and before the return day to the Supreme Court, for the purpose of urging this affiant in making out the transcript of the record in this case for appeal, and that at the same time the said Marigny expressly waived the formality of citation, alleging

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his wish to bring the said appeal before the Supreme Court, as expeditiously as possible, and promising not to take any advantage which might result from the non-compliance with said formality on the part of this affiant; and further, this affiant deposes that the reasons above stated, are the only cause why the citation of appeal in the above case was not issued, and does not appear upon the record."

Hugh Farrie, the deputy clerk, made affidavit, "that after the judgment in the above entitled cause, was rendered against the plaintiffs, they presented the petition of appeal which is found in the transcript of the record of said suit; that said appeal was allowed, and affiant caused a transcript of the record to be made out in said suit; that said transcript is the one now on file in the Supreme Court, and is a true and correct one, and contains all the evidence adduced by either of the parties on the trial, as well as of all documents filed in said suit, and introduced on the trial thereof, except certain material records, which the counsel for the parties agreed should not be inserted in the record, but should be taken up to the Supreme Court, separately, either in the originals or certified copies. That before said transcript was completed, and before the day fixed by the order of the judge for the return of the appeal, Joshua Lewis, late judge of said court, fell sick and never held court after the seventh day of May, 1833, and departed this life on or about the fifth day of June ensuing."

Conrad and Potts, for plaintiffs and appellants.

Hennen, contra.

1. The appellee complied with the agreement, as related by Lewis. Service of the appeal being accepted by his counsel, 19th November, 1833, as appears from the record.

2. The first appeal was abandoned, by taking a second from judge Watts, on the 20th November, 1833. 4 *Miller's Reports*, 41 *Doner vs. Sergeant*. *Code of Practice*, art. 594.

3. No bond having been given on the second appeal, the appeal must be dismissed.

4. The first appeal was not returned on the return day, the appeal should therefore be dismissed. 3 *La. Reports*, 250, *Bell vs. Williams*. *Idem*. 440, *Bains vs. Higgins*.

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GUILLAUME
vs.
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INSURANCE CO.

MARTIN, J., delivered the opinion of the court.

We granted a rehearing on this case to the plaintiffs, on their exhibiting an affidavit of the clerk of the District Court, who stated he had forborne issuing a citation, the defendant and appellee having told him it was unnecessary, and the service of the citation would be acknowledged. This was not admitted by the defendant, and it appears some misunderstanding has taken place.

We are of opinion, that so important a part of the proceedings in an appeal, as the citation of the appellee, cannot be proved as a matter *in pais*, but must appear as a matter of record, or at least must be established by the written acknowledgment of the party.

The citation of the appellee cannot be proved, as a matter *in pais*, it must appear as a matter of record, or at least must be established by the written acknowledgment of the party.

Our former opinion must, therefore, remain undisturbed, as the judgment of the court in the present case.

GUILLAME vs. THE LOUISIANA INSURANCE COMPANY.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS,
THE JUDGE THEREOF PRESIDING.

This case presents a question of fact, only.

The petition alleged that the Louisiana Insurance Company, in consideration of a premium of one hundred and seventy-four dollars, insured the plaintiff against damage by fire, with the usual exceptions, relating to foreign invasions, &c., to the amount of eleven thousand and six hundred

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dollars, on furniture and other property, more particularly described in the policy, dated 11th of June, 1832. The policy insured him against loss by fire, on wines, spirits, liquors and provisions, stored in a building at the left side of a public hotel, situated at the foot of the rail road, near lake Pontchartrain, amounting to four thousand and seven hundred dollars; and also on kitchen utensils and furniture, to the amount of one thousand and one hundred dollars.

On the night of the 8th of September, 1832, the whole of the wines, liquors, &c., stored in the said building, together with the kitchen utensils and furniture, were, by accident, destroyed by fire; causing a loss, as the plaintiff alleges, amounting to six thousand dollars, on the wines, spirits, &c., and one thousand and one hundred dollars on the kitchen utensils and furniture.

The petition avers, that as soon afterwards as possible, he gave notice of this loss to the President and Directors of the Insurance Company, and delivered them as a particular account of his damages as possible, his books and other vouchers, exhibiting the amount of the loss and other circumstances of the occurrence, with his oath at the foot of the statement, and other certificates, required by the policy.

The Insurance Company admitted the insurance of the articles, as stated in the petition, but denied the other allegations, particularly that the value of the articles in the building at the time, was so great as stated.

P. Soulé, Esq. testified, that he applied to the company on behalf of the plaintiff, and after a month's delay, was answered that the board had refused payment.

Francois, testified, that a few days previous to the fire, the plaintiff's store was filled with merchandise, and the kitchen was well furnished. The kitchen and store were entirely consumed, though every effort to save them was made; and nothing in either of them was preserved.

Guildemeester attended at the inventory in June, previous. He thought the appraisement not high. He had seen bills of all the articles, specified in the inventory.

Gerard was also present at the making of the inventory. He examined the store at the time, and thought the statement correct. He was accustomed to keep a store, and did not think the appraisement of the articles in the store, and of the kitchen utensils and furniture, high.

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Gabaroche was in plaintiff's store five days before the fire, and found it so full that it was impossible to put a cask of wine in it; believes the merchandise then in it was worth four or five thousand dollars; two casks of wine were then standing at the door, for want of room within.

The defendants produced several witnesses.

Bagley, testified, that during the fire, and after the weather boards were burnt, he saw within the store a pile of boxes, apparently of wine, about thirty in number. He saw there no pipes or barrels, nor any thing burning like spirits. It was an hour and a half after the fire was discovered, when he looked into the store.

Spencer, saw forty or fifty boxes of wine in the store, but could see no barrels or casks there. The ground floor then remained.

Franqueville, for the plaintiff, testified that he and one *François*, about twelve o'clock of the night the fire occurred, had inspected the buildings at the plaintiff's request. That the plaintiff's wife and child were saved from the fire with some difficulty; that he believes the greatest part of the goods were destroyed before the weather boarding was burnt, so that a person could see into the store.

Judgment was rendered for the plaintiff for the sum of five thousand and eight hundred dollars.

The defendants appealed.

MATHEWS, J., delivered the opinion of the court.

This is an action on a policy of insurance, against damage and loss by fire. The plaintiff obtained judgment in the

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DEMITRY.

court below, from which the defendants appealed. The case has been submitted on the appeal without argument.

It appears, from an examination of the record, to involve only matters of fact, and the main fact put at issue by the pleadings, relates to the quantity and value of the merchandise owned by the plaintiff, and which was actually destroyed by fire, to the injury and loss of the assured; in other words, the amount of damage which he really did sustain. With a view to ascertain the truth in relation to this part of the cause, we have turned our attention particularly to the testimony. That adduced on the part of the plaintiff, and not circumstantially contradicted by the witnesses of the defendants, although not so entirely explicit as might be desired, is, in our opinion, sufficient to support the judgment rendered by the Parish Court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs in both courts.

Grimes, for defendants and appellants.

Soulé, contra.

PICQUET vs. DEMITRY

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In an action against the drawer and endorser of a promissory note, although the drawer may plead the respite granted him in bar to the suit, this plea has no effect on the liability of the endorsers.

This suit was brought by Louis Joseph Pecquet, the second endorser of the following note, against the first endorser and the drawer *in solido*.

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PICQUET
vs.
DIMITRY.

"Nlle.-Orleans, le 13e. Decembre, 1832.

A quatre vingt-dix jours de cette date, je paierai a l'ordre de Monsieur A. Dimitry, mille cinq cents piastres, valeur requue. (Signed) P. Pandelly. (Endorsed) A. Dimitry; Ls. J. Picquet; F. P. Ducongé."

At maturity the note was duly protested for non-payment, and notice thereof given to the endorsers.

Pandelly pleaded that a respite of one, two and three years, had been granted to him. He added the general denial.

Dimitry pleaded the general denial.

The plaintiff proved the signatures of the drawer and endorser, the protest of the note at maturity, and notice to the endorser.

The drawer offered in evidence the proceedings in the cause of himself *vs.* his creditors, by which it appeared, that on the 23d February, 1833, the judgment of the court was pronounced, homologating the proceedings before the notary, and giving him a respite for the payment of all his debts, of one, two and three years.

Pandelly's plea of respite was sustained, and judgment was rendered against Dimitry for the amount of the note, with legal interest.

Dimitry appealed.

MATHEWS, J., delivered the opinion of the court.

This suit was brought by the holder of a negotiable note, against the maker and endorser, and claimed judgment *in solido*, &c. The maker of the note pleaded a respite obtained from his creditors, in abatement of the plaintiff's action. This plea was sustained by the court below, and judgment rendered against the endorser alone, from which he appealed.

The cause was argued *ex parte* by the plaintiff's counsel

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In an action against the drawer and endorser of a promissory note, although the drawer may plead the respite granted him in bar to the suit, this plea has no effect on the liability of the endorser.

before this court, solely in relation to the correctness of the judgment, as rendered against the appellant, consequently the steps taken by the District Court, touching the interest of the maker of the note, are not now to be investigated.

In the points filed, ten per cent. as damages are claimed by the appellee, on the ground that the appeal is frivolous, and was taken for delay alone. It appears, from the evidence of the case, that all measures required by commercial law, to charge the endorser, were pursued by the holder of the note, and he having thus been absolutely indebted to the latter, both jointly and severally, with the maker, the respite pleaded as above stated, could not legally alter his situation as an unconditional debtor to the plaintiff.

If the indulgence granted to the maker of the note, could have any influence on the situation of the appellant, it might properly be offered as an additional reason why he should be compelled to make immediate payment, the creditors having lost his recourse, at least for a time, according to the opinion of the District Court, against one of his debtors *in solido*.

We are of opinion, that ten per cent. damages should be allowed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with ten per cent. damages on the amount thereof, and costs in both courts.

Grymes, for defendant and appellant.

Denis, for appellee.

EASTERN DISTRICT
January, 1833.

THOMASSON vs. BAUM.

THOMASSON
vs.
BAUM.

APPEAL FROM THE FIRST JUDICIAL DISTRICT.

Where the record contains no statement of facts, and the certificate of the clerk shows that the testimony taken in open court was not reduced to writing, the case cannot be examined on its merits in the Supreme Court.

This action was brought against the defendant as acceptor of the following bill of exchange:

“Louisville, Nov. 20, 1832.

Thirty days after date, pay Mr. W. P. Thomasson, or order, four hundred dollars, and place the same to your obt. servant.

“Signed, Dudr. Heinsake.

“Dr. Wm. Baum, present.”

It was endorsed, “accepted, payable as soon as convenient, Nov. 20, 1832. Dr. Wm. J. B. Baum.”

The defendant denied his liability on the said bill, on the ground that the endorsement which he had made, did not constitute an acceptance of the bill.

The case was submitted to a jury, who found a verdict for the plaintiff for the amount of the bill, with interest at six per centum per annum, from 20th of December, 1832, until payment. Judgment was entered for the amount of the bill with eight per centum interest, until payment.

A motion for a new trial was overruled, and the defendant appealed.

The judge, *a quo*, gave no certificate.

The clerk's certificate stated that the transcript contained all the proceedings, and all the documents filed, but was silent in regard to testimony adduced. The transcript mentioned the names of two witnesses of the plaintiff, but no statement was given of their testimony.

Hennen, for appellee, moved to dismiss the appeal, because

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January, 1834. statement thereof has been made.

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VS.

JANES.

Harrison, for defendant and appellant.

MATHEWS, J., delivered the opinion of the court.

Where the record contains no statement of facts, and the certificate of the clerk shows that the testimony taken in open court was not reduced to writing, the case cannot be examined on its merits in the supreme court.

In this case a motion is made on the part of the appellee to dismiss the appeal, on the grounds that the record does not contain all the evidence on which the case was adjudged in the court below, and that no statement of facts was made out, as required by law. The record exhibits no statement of facts, and the certificate of the clerk shows that the testimony taken in open court, was not reduced to writing; under these circumstances, it is impossible for the appellate court to examine and decide the case on its merits.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed at the costs of the appellant.

BOWMAN vs. JANES.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The request of one of the parties can alone authorise the testimony to be taken in writing by the clerk.

If the parties disagree as to a statement of facts, where the testimony has not been taken in writing by the clerk, at the request of one of the parties, the judge is bound to make a statement of facts, and he has no right to avoid the obligation which the law imposes on him, by directing, *ex officio*, the testimony to be taken in writing by the clerk.

The petition alleges that Joseph François Gaiennic, sold a certain tract of land near the bayou Plaquemine, to William

Janes, for seven hundred dollars, for which the vendee's promissory notes were given, with privilege on the land for its payment. The plaintiff sues, as the assignee of the vendor. The transfer of the notes, with the privilege, was made by public act. Janes conveyed a large amount of his property, including the lot of land, to his brother, Joseph Janes, who thereupon assumed to pay his debts. This suit was brought against Joseph Janes on that ground, to recover the amount of the notes with the benefit of the mortgage.

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No answer was filed, and a trial by jury having been prayed for, the plaintiff submitted his cause to a jury, who found a verdict for him, for the amount claimed in his petition.

On the trial, John J. Burk, Esq., stating that he was not employed in the cause, moved the court, as *amicus curiæ*, that the testimony given, should be taken by the clerk in writing. The plaintiff's counsel objected to this motion, on the ground that the mover had no authority to make it, but the objection was overruled by the judge, *a quo*, who considered that he had the power, *ex officio*, to order the testimony to be taken in writing. The plaintiff excepted to this decision.

After the verdict had been rendered, on motion of the plaintiff, the judge, *a quo*, instructed the jury to retire again, and consider their verdict with regard to the mortgage. An amended verdict was then returned, giving the plaintiff the benefit of his mortgage.

The defendant appealed.

Ives, for plaintiff and appellee, moved to dismiss the appeal.

1. The order of appeal is not dated, and it does not, therefore, appear that the said appeal is prayed for and made returnable at the proper term of this court. 4th Louisiana Reports, p. 280.

2. Taking the date of the filing the petition of appeal in the court below, to wit, 19th November, 1833, at time of

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January, 1833.

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vs.
JAMES.

granting the appeal, it should have been made returnable on or before the third Monday of December, or in December term. *3d Louisiana Reports, pages 250 and 440.*

3. This court can not examine the testimony brought up in the record, because the same was not legally taken down on the suggestion of an *amicus curiæ*; the defendant not appearing by person nor by attorney; nor by the court, *ex officio*. *Code of Practice, article 601.* No statement of facts was drawn up as required in such cases by *Code of Practice, art. 602.* And the exception of plaintiff's counsel to the taking down of the testimony by the court, *ex officio*, or at the suggestion of an *amicus curiæ*, was improperly overruled by the court below.

Nicholls, for defendant and appellant, in answer to the points filed by appellee, for the dismissal of the appeal.

1. The law does not require that the order of the judge, granting the appeal, should be dated. *Code of Practice, art. 574.*

2. The day of filing the appeal bond and petition of appeal, is the true date; from that time the appeal could not have been made returnable at an earlier date, taking into consideration the distance from Iberville to New-Orleans. *Code of Practice, art. 180.* The judge having made it returnable in January, establishes the insufficiency of the time. It is the act of the judge, and not of the party. *Code of Practice, art. 583.* The judge is supposed to have acted legally, until the contrary be proved.

3. It is respectfully submitted, whether by the constitution, there are more than two terms of the supreme court, in each and every year. That instrument, instead of terms, used the word sessions; first divides the state into two grand divisions, the Eastern and Western division, the Eastern division shall hold its sessions in New-Orleans, during nine consecutive months, constituting thereby a term of the court, as used by the *Code of Practice*, in the article cited.

Appellant considers term and session as synonymous; and that sessions in the Constitution, and term in the Code, mean the same thing. *State Constitution, art. 4, sec. 3.*

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4. The case being properly before the appellate court, by the exception of appellee, it will render such judgment as justice may require, no matter through what channel the information may be conveyed to it. If taken even irregularly, the court is bound to notice it, particularly when the party was unrepresented on the trial. *12th Mar. Reports, p. 355. 8th Mar. Reports, 235.*

5. The testimony was not taken down illegally. Article 601 of the *Code of Practice*, grants to either party the right of having the testimony taken in writing; if this be done, either at the requisition of the judge, or of an *amicus curiæ*, no rule of law or justice can deprive him of the benefit of it. Appellee complains with an ill grace of his own testimony, taken in his presence, under his own supervision, and in the absence of his adversary.

On the merits, the appellant urged that the judgment should be reversed on the following grounds:

1. The debt sued for, was in its origin, due neither to plaintiff, nor by defendant; appellee was bound to show his own right to sue, and defendant's liability to pay, in both of which he failed. The debt was not of a negotiable nature, this right could only accrue by notice of the transfer, which is neither correct nor proved. *Louisiana Code, art. 2613.*

2. Appellant's liability is not established; it is based on the following words in the sale from William Janes to appellant, viz: "*and to satisfy any other just and legal claim against me, and to defend and protect my interests in the settlement and adjustment of said claims, and to pay and satisfy such sums, as may be justly and legally due upon any of the sales aforesaid, to me.*" This undertaking on the part of appellant, creates no assumpsit to the appellee, who did not know him as creditor of William Janes, nor even to Gaiennie, the original creditor.

3. Appellee mistook his remedy, and was premature in instituting suit, a previous recovery should have been had

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against Wm. Janes, his real debtor, who was able to defend himself, and not against appellee, who was only bound to pay what might be *justly* and *legally* due, which could only be ascertained by a judgment against Wm. Janes.

4. The promise to pay, was a personal promise to William Jones, and enures exclusively to his benefit, and it differs materially from a promise to pay a particular person a specified sum, which appellant admits might be enforced. Here neither creditor nor debt is specified, nor did any legal novation take place by the sale from William to Joseph Janes. *Civil Code, art. 2185.*

5. The judge, *a quo*, erred in receiving a second verdict, after the first had been regularly returned and recorded. The power of the jury to revise or change their verdict, is restricted in point of time. Article 527 of the *Code of Practice*, provides that *after* reading the verdict, and on the jury answering they were agreed, it shall be recorded; and the subsequent article declares, that if on reading the verdict, it appears there is some want of form, it may be corrected, *in order to be read and recorded.* A verdict, therefore, can only be altered before it is recorded, and that in a matter of form only, not substance.

6. There being no legal verdict, the court could pronounce no judgment.

MARTIN, J., delivered the opinion of the court.

The plaintiff and appellee has prayed for the dismissal of the appeal, on the ground that there is neither a statement of the facts, nor any document legally supplying one, no bill of exceptions, or assignment of errors, &c. The defendant and appellant has urged, that the testimony was taken down in open court during the trial, which is declared by law to serve as a statement of facts when none is made.

The appellant has urged that the testimony was taken down on the application of an *amicus curiæ*, who did not pretend, and it is not urged, had any authority to represent the defendant, or to move any thing in his behalf; that his,

the plaintiff's and appellee's counsel, objected at the time to the testimony being so taken down, unless at the request of the defendant; but his objection was overruled, the judge being of opinion the court might, *ex officio*, direct and order the testimony to be taken.

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The *Code of Practice*, 601, provides, that either party "may require the clerk to take down the testimony in writing, which shall serve as a statement of facts, if the parties do not agree to one."

The testimony thus taken in writing, can serve as a statement of facts, when the parties do not agree to one in the whole case, when the clerk has been required by either party. In the present case an absolute stranger, unconnected with and unauthorised by *either* party, made the requisition on the clerk, the only party who was in court, objecting thereto. The testimony was therefore taken in writing without the request of one of the parties which alone could authorise it.

The request of one of the parties, can alone authorise the testimony to be taken in writing by the clerk.

The parties have the right, if the testimony be not taken alone in writing, at the request of either of them, and they do not agree on a statement of facts, to call upon the judge to make one. He is bound to do so at the request of either party, and we are unacquainted with any right in him to avoid the obligation the law imposes on him, by directing, *ex officio*, the testimony to be taken down in writing by the clerk.

If the parties disagree as to a statement of facts, where the testimony has not been taken in writing by the clerk, at the request of one of the parties, the judge is bound to make a statement of facts, and he has no right to avoid the obligation which the law imposes on him, by directing, *ex officio*, the testimony to be taken down in writing by the clerk.

The law contemplates three modes of bringing up the facts of a case before us, when they do not appear in written documents. A statement agreed on by the parties or their counsel; in the absence of this, a statement made by the judge, or a copy of the testimony taken down in open court by the clerk, at the request of either party; and it appears to us, the judge cannot restrain this right, by directing the testimony to be taken down by the clerk.

As the appellant has not brought to this court, a record which enables us to reverse the judgment appealed from, the appeal must be dismissed at his costs.

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In case the judge before whom the cause is pending, is incompetent to try it, and the right to a trial by another judge is denied, the injury from such a judgment is irreparable, and an appeal therefrom may be taken.

The act of 1824, relating to the trial of causes in which the judges are recused, impliedly repeals the thirtieth section of the act of 1813, which directed the transfer of a cause which the district judge was incapacitated to try, to the court of a neighboring district.

The first section of the act of 1824, in which the legislature order certain causes to be tried by the parish judge, repeals the first section of the act of 1822, amending the several acts to organise the courts.

Where a parish judge is legally called on to try a cause in the district court, he is a district judge *ad hoc*, and exercises the powers of a district court.

The art. 342 of the Code of Practice, is applicable only to courts sitting in the city of New Orleans.

The law of 1822, as to the trial of causes, cannot be resorted to, to prevent a delay of justice, in those cases to which the act of 1824 is inapplicable.

The judge before whom the case originated, and that whom the law calls in his place, being both incapacitated from acting, is a *casus omissus*, and is remediable by the legislature only.

On the second of January, 1830, Jean Ursin Jarreau, sold to Jean Mani Choppin, and Antonio Bonaventura Michel, a steam saw mill with all its appurtenances, and the lot of ground on which it stands, situated in the parish of Point Coupée. The purchase money was nine thousand dollars, secured upon the premises by act importing confession of judgment, and to be paid at specified periods. Mani Choppin died, and the premises passed into the possession of Claude Antoine Choppin, by a purchase at a probate sale of the property of the deceased. The vendor brought suit against the surviving vendee and Claude Antoine Choppin, for the

seizure and sale of the property, for the payment of one of the instalments, amounting to two thousand eight hundred and thirty-four dollars.

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Claude Antoine Choppin, then instituted an action by injunction, against Jarreau and the sheriff, to stay all further proceedings on the order of seizure and sale of the property, for certain causes specified in his petition, addressed to the judge of the fourth judicial district, in and for the parish of Point Coupée.

The plaintiff in the first action, appeared and moved that the cause be referred to the district judge of one of the adjoining districts, and that the clerk transmit to such judge a certified copy of this order, and requiring him to attend and try this cause on a certain day, on the ground that the judge of that court, and of the parish court for that district, had both been employed as counsel in the cause.

The parish judge was sworn, and deposed that he had been employed as counsel in this cause. The judge of the district court, in his written opinion, stated that he had been employed as counsel in the cause.

The judge *a quo* overruled the motion. The plaintiff appealed.

Mitchell, for defendant and appellant.

The decision of the district court is erroneous and must be reversed, and the district judge be ordered to refer the case. Acts of 1813, 34; 1814, 74; 1817, 42; 1822, 84; 1824, 8; 1825, 120; 1828, 160; 1831, 100. Extra session, 12; 1833, 93. *Code of Practice*, 128, 342. *Civil Code*, 17, 18.

Turner and Ogden, contra.

1. There has been no final judgment rendered. *Code of Practice*, art. 566.

2. There has been no interlocutory judgment rendered in the case, from which an appeal will lie. *Code of Practice*, 567. *Jacob's Law Dictionary*, vol. 3, p. 527, 532. *Blackstone's Commentaries*, vol. 3, p. 448.

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3. Because an appeal in the present case, is not the proper remedy. *Code of Practice*, 829, 830, 831.

4. The motion of the appellant was properly overruled in the district court. The judge of the court being the counsel on record, was directed by the act of 1824, 5th February, to refer the trial of the cause to the parish judge of the parish, and it then remained for the parish judge, when called on to act, to determine whether he, also, was disqualified to try the cause, on the ground of having an interest, or having been of counsel, or consulted in the cause.

5. The parish judge, since the act of 1824, is the only competent judge to try those causes where the district judge recuses himself, or is recused by the parties, and when the parish judge is also disqualified to act, there is no other tribunal by the existing laws, empowered to try the cause. The act of 1822, by which it was provided, that whenever the judge of any district court shall be a party to any cause therein pending, &c., the cause shall be referred to a judge of one of the adjoining districts, must be considered as virtually repealed by the act aforesaid, of 1824, because the provisions of this last, are entirely irreconcilable with those of the former, and the least compliance by the court with the act of 1822, would be a violation of the clear and positive directions of the subsequent act of 1824, by which, without any *proviso* whatever, a disposition of the cause altogether different, is directed to be made.

6. The act of 1822, was repealed by the act of 1824. The act of 1813, *Moreau's Dig.* p 397, was in like manner repealed by the act of 1814, and this act was in like manner dispensed with, so far as its provisions were changed by the act of 1817. See *Digest*, 303 and 324. In like manner the provisions of the act of 1817, so far as changed by the act of 1822, were repealed. This was the course of practice acquiesced in under these several statutes.

MARTIN, J., delivered the opinion of the court.

The plaintiff is appellant from the refusal of the district court, who refused, on his suggestion, that the judge of the

court, and that of the parish in which it was holden, had been employed as counsel in the case, to order a trial of it by the judge of one of the adjoining districts.

The defendant and appellee has prayed for the dismissal of the appeal, because the decision appealed from, is not a definitive judgment but a mere interlocutory one, which works no injury irreparable by appeal from the final judgment.

It is clear, that as the district judge before whom the action is pending, cannot give a final judgment in this case, if the plaintiff has the right to have it tried by another judge and that right is erroneously denied him, this denial works against him an injury which no final judgment in the cause can repair, since no final judgment can be given therein, till the decision of the district court be revoked by this. We therefore, think the appeal was properly taken.

On the merits, the appellant has relied on several acts of the legislature, viz. 1813, 34; 1814, 74; 1817, 42; 1822, 84; 1824, 8; 1825, 12; 1831, 100; extra sessions of that year, 12; 1833, 93; and the *Code of Practice*, 128 and 342; and *Code*, 17 and 18.

The sole question presented for solution to this court, is whether the district court erred in overruling the motion of the plaintiff's counsel, for an order of reference of the case to the judge of one of the adjoining districts, it appearing that both the district judge before whom the case was pending, and the judge of the parish in which the court was sitting, had been employed and consulted therein.

This motion was grounded on the first section of an act passed in 1822, page 84. This motion was opposed on the ground that the provision in this section had been repealed, a different one having been made by the first section of the act of 1824, page 122, which orders a reference of the case to the parish judge.

The counsel of the appellant relies on our *Civil Code*, 17 and 18, which provides that "laws *in pari materia*, or upon the same subject, must be construed with a reference to each other. What is clear in one statute, may be called

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in aid, to explain what is doubtful in another;" and that, "the most universal and the most effectual way of discovering the true meaning of a law, where its expressions are dubious, is by considering the reason and spirit of it or the cause which induced the legislature to enact it."

This part of the *Code* would be applicable, if the expressions of the act of 1824 were dubious, or did not present the true meaning of the legislature: but this is not pretended.

If there was a need of construction in order to ascertain whether the act of 1824 was intended to present a cumulative, rather than a *new* provision, we would think that the mischief was, that a district judge under the act of 1822, was compelled to travel to another parish, while his services were required by suitors in that of his own district; that a choice was to be made between two distinct judges, whether the selection might offer a cause of complaint to one of the litigants; the legislature, therefore, applied a remedy to this mischief, by exempting district judges from being called on to travel out of their districts; and abolishing the selection.

A law must be expressly or impliedly repealed. *Civil Code*, 23. It is impliedly so, when the new law contains provisions contrary to, or irreconcilable with the former one.

The act of 1824, relating to the trial of causes in which the judges are recused, impliedly repeals the 30th section of the act of 1813, which directed the transfer of a cause which the district judge was incapacitated to try, to the court of a neighbouring district.

Thus the act of 1824, was a repeal of the thirtieth section of the act of 1813, which directed the transfer of a cause which a district judge was incapacitated to try, to the court of a neighboring district. The new act requiring that the judge of a neighboring district should come and try the cause in the court in which it had been instituted. The provision that the judge should come *into* the district being contrary to, and irreconcilable with the former, which required the transfer of the cause to the district of the judge who was to try it. The new provision being imperative, could not be said to be cumulative only, so as to authorize a transfer, *ad libitum*, to it or to the former.

The 1st section of the act of 1824, in which the legislature orders the cause to be tried by the parish judge, repeals the 1st section of the act of 1822, amending the several acts to organize the courts.

So the provision of the act of 1822 being inconsistent, contrary to, and irreconcilable with that of the act of 1824, in which the legislature orders the cause to be tried by the parish judge, the provisions of the former act, must be considered as repealed.

Expressio unius est exclusio alterius. When the legislature expresses its will, that a cause shall be tried by a parish judge, it intimates forcibly its will, that its former provision that the district judge shall try it is to be superseded.

It would have been different if the latter act had merely authorised or permitted the parish judge to try the cause; thus he and the district judge would have had concurrent powers. But the last act is imperious and requires the cause to be tried by the parish judge.

Lastly, the counsel of the appellant has referred us to the *Code of Practice*, 128, 342.

The 128th article contains the jurisdiction of parish courts, but where a parish judge is legally called on to try a cause in the district court, he is a district judge *ad hoc*, and exercises the power of a district court.

Where a parish judge is legally called on to try a cause in the district court, he is a district judge, *ad hoc*, and exercises the power of a district court.

The 342d art. of the *Code of Practice*, is applicable only to courts sitting in the city of New-Orleans.

The article 342 is applicable only to courts sitting in the city of New-Orleans, where the district and parish courts have in several cases, concurrent jurisdiction. It is not pretended that in the parish of Point Coupée, in which the present action originated, there are courts of concurrent jurisdiction.

The *Code of Practice*, as to the disposal of causes, in which the judge is recused refers us to anterior laws.

In the acts of the legislature posterior to that code, the provision which appears is applicable to the present case.

As we are of opinion that the act of 1824 repeals that of 1822, it follows that the latter cannot be referred to in order to prevent a failure, or rather delay of justice, in cases in which the act of 1824, cannot be referred to. The judge before whom the cause originated, and that whom the law calls in his stead, being both incapacitated from acting, the appellant is precisely in the same situation, in which a suitor would have been, under the act of 1822, if the judge of his own and that of the two neighboring districts, had been incapacitated. His would then be a *casus omissus* in the law and remediable by the legislature only.

The law of 1822, as to the trial of causes, cannot be resorted to, to prevent a delay of justice in those cases to which the act of 1824 is inapplicable.

The judge before whom the case originated, and that whom the law calls in his place, being both incapacitated from acting, is a *casus omissus*, & remediable by the legislature only.

It is therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

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MYERS vs. SLACK.

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APPEAL FROM THE FOURTH DISTRICT, THE JUDGE OF THE SECOND PRESIDING.

Where a cause, depending mainly on matters of fact, had been submitted to five juries, and three verdicts had been given for the plaintiff, and the two other juries were unable to agree, and on appeal the cause was remanded for a new trial, and a fourth verdict was afterwards had for the plaintiff on the second appeal, the Supreme Court refused to set aside the verdict.

This cause was brought by the owner of a slave named Joe, drowned while in the defendant's employ, to recover of him the value of the slave.

This cause is now before this court on second appeal. It was remanded for a new trial on the previous appeal, because the Supreme Court were unable to agree with the three juries who had found verdicts for the plaintiff. For a statement of the facts and the opinion of this court on the first appeal. See 5 *La. Rep.* 53.

On the sixth and last trial in the inferior court, in addition to the testimony which had been offered on the previous trials, and which was all read by consent, several witnesses were produced for the first time.

Lambremont, for the plaintiff, testified that on the trip on which the negro Joe was drowned, the witness was in the skiff with him and Ross, who commanded. As they passed plaintiff's house, he hailed them and asked where they were going, to which the reply was that the defendant was sick and they were going to obtain wine and other things for him. No jug was given to Joe by the plaintiff as they passed, nor did they stop there but at another plantation where Joe borrowed the jug, nor did they see plaintiff after passing his house. Ross who was intoxicated the day Joe was drowned did not oppose Joe in getting the jug. Joe likewise was drunk when witness left the boat and had been the day previous.

Baddeaux, for plaintiff, testified that near midnight of the night when the slave was drowed, Ross came to his house intoxicated.

Brent, for defendant, testified that after Joe's death, by defendant's request, he informed plaintiff that the defendant's illness had been the occasion of Joe's trip, that Joe had gone after medicine. Plaintiff replied it made no difference about the fifteen days exactly, and he did not blame the defendant for having sent him. Plaintiff said his jug of whiskey had been safely brought to him. The navigation of the bayou was not dangerous.

The jury found for the plaintiff for five hundred and fifty dollars. The judge *a quo* refused to grant a new trial. He remarked that had the case been submitted to him, he might and probably should have come to a different conclusion.

Morgan and Labauve, for defendant and appellant.

Burk, contra.

MATHEWS, J., delivered the opinion of the court.

This suit is brought to recover the value of a slave which was hired by the plaintiff to the defendant. The claim is made on account of the loss of said slave who was drowned whilst in the service of the defendant, and whilst he was employed in a manner not authorised by the contract of hiring. The petitioner further alleges that the death of his slave occurred in consequence of negligence and want of ordinary care on the part of a person under whose direction he was placed by authority of the defendant.

This is the second time the case has been before the Appellate Court, and the plaintiff and appellee now appears aided by four verdicts in his favor, having obtained three before the cause was first before this court, and one since it was remanded for a new trial.

The evidence which comes up on the present appeal, does not differ very materially from that which appeared on the record on the former. An additional witness testified

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Where a cause depending mainly on matters of facts, had been submitted to five juries, and three verdicts have been given for the plaintiff, and the two other juries were unable to agree, and on appeal the cause was remanded for a new trial, and a fourth verdict was afterwards had for the plaintiff, on the second appeal the Supreme Court refused to set aside the verdict

on the last trial in the court below, and his testimony does give a coloring to the whole evidence of the case, rather more unfavorable to the defendant, than was exhibited previously. A correct adjustment of the dispute between the parties depends mainly on matters of fact, and as four juries have decided these matters in favor of the plaintiff, we are of opinion that the judgment of the court below ought not again to be disturbed.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the District Court, be affirmed with costs.

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APPEAL FROM THE THE FOURTH JUDICIAL DISTRICT, THE JUDGE OF THE SECOND PRESIDING.

Service of the citation and petition of appeal at the last domicil of the appellee, residing within the state is insufficient, it should have been at his usual residence.

This was an action to recover damages for slanderous words spoken of the plaintiff by the defendant. The general denial was pleaded.

The cause was submitted to two juries in the inferior court, and both returned verdicts for the plaintiff. The defendant appealed.

The sheriff's return of the service of citation of appeal was in the following words:

"Received, Friday, 17th May, 1833, and served same day by leaving a copy thereof, together with a copy of petition of appeal with James M. Cummings, a free white person above the age of fourteen, at the last domicil of Daniel Veuve, in the parish of Iberville."

Isley, for defendant and appellent.

Ives and Labauve, for plaintiff and appellee, moved to dismiss the appeal for want of the proper citation, and in support of this ground, Thos. E. Ives, Esq., made affidavit "that, at the time when the petition of appeal purports to have been served, the plaintiff and appellee was a resident of the State of Louisiana; that the officer who served the petition of appeal was apprised of that fact as also some of the counsel of the defendant and appellant by this affiant, at the time when the said officer had in his hands the petition and citation of appeal in the above suit."

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MATHEWS, J., delivered the opinion of the court.

In this case a motion is made to dismiss the appeal on account of irregularity in its service.

The return of the sheriff shows the service of the citation to have been made by leaving a copy thereof, and copy of the petition of appeal at the last domicile of the appellee, with a free white person above the age of fourteen.

According to the articles 581 and 582 of the *Code of Practice*, the service of citation in an appeal, must be made on the appellee if he reside within the state; such service may be made personally, or by leaving a copy thereof at the usual domicile of the appellee.

The motion to dismiss is supported by an affidavit showing the residence of the appellee to be within the state; and the return of the officer does not conform to the provisions of the *Code of Practice*. There is an evident difference, and that essential between the usual and last domicile of a person within the state; the latter phrase would employ the removal of such person. But in the present case it is shown that the appellee still resided in the state at the time of the pretended service of the citation, which should have been made on him, either personally or leaving a copy as requested by law, at his usual domicile.

Service of the citation and petition of appeal at the last domicile of the appellee, residing within the state is insufficient, it should have been at his usual residence.

It is, therefore, ordered, adjudged and decreed, that this appeal be dismissed, at the costs of the appellant.

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ANSELM vs. BRAUD

ANSELM
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APPEAL FROM THE COURT OF THE FOURTH DISTRICT, THE JUDGE OF THE
 SECOND PRESIDING.

When the general denial is pleaded to an action against the defendant as the drawer of a promissory note annexed to and made a part of the petition any variation between the name of the drawer as signed to the note and the defendant's name as described in the petition may be reconciled by parol testimony.

This action was brought against the defendant as drawee of the following note, which was annexed to the petition, "and referred to for more certainty."

"Dans le courant de Mars prochain, je payerai à l'ordre de Jacob Anselm, la somme de deux cents soixante-quinze piastres, avec intérêts à raison de dix pour cent par an de cette date, jusqu'à parfait payement, pour valeur reçue.

Iberville, ce 16 Mai, 1831.

"Témoin,"

(Signed) Breux."

(Signed) J. Labauve.

The defendant's name was styled in the petition Charles Brand or Braud. The general denial was pleaded.

On the trial the plaintiff offered the note in evidence, and offered to prove the signature of the defendant. The defendant objected to its introduction as not being the same note described in the petition. The objection was sustained and the plaintiff took his bill of exceptions.

Judgment as in case of non-suit was rendered, from which the plaintiff appealed.

Labauve, for plaintiff and appellant, contended, that the court below erred in rejecting the note sued upon and offered in evidence :

1. Because the answer of Charles Braud, the defendant, admitted his signature to the note. *C. C. art. 2243, C. P. 324, 325 and 326. La. Rep., vol. 1, p. 486.*

2. Because plaintiff offered evidence to prove the signature, notwithstanding the admission of defendant.

3. The court erred in giving a non suit, it should have given judgment for plaintiff, the execution of and the signature to the note being admitted.

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4. The above errors being considered, it is believed that the judgment should be reversed and rendered here for the plaintiff and appellant; this court being in possession of sufficient evidence, according to the pleadings to authorise such judgment.

Nicholls, contra.

MATHEWS, J., delivered the opinion of the court.

This case comes up on a bill of exceptions, taken to the opinion of the judge *a quo*, by which he refused to admit in evidence the promissory note, on which the action purports to be founded.

The petitioner charges Charles Breux or Brand as the debtor, and the note, on which the suit is brought, is annexed to and made a part of the petition, and appears to have been signed by Charles Braud. The answer contains only a general denial.

On the trial of the cause, the plaintiff offered to prove the signature of the defendant, but as the note itself was rejected on account of error, as to the name of the signer; this testimony was also rejected, and a judgment of non suit rendered, from which the plaintiff appealed.

In support of the correctness of the judgment of the court below, we are referred to a decision to be found in 11 *Martin*, p. 547, which would perhaps justify the pretensions of the appellee, were it not for a very important difference in the feature of that case from the present. In the former, the instrument declared on was not annexed to the petition, or in any manner made a part of it; nothing appeared to put the defendant on his guard against the discussion between the allegation and the proof offered.

In the case now under consideration, the promissory note itself being annexed to, and made a part of the petition, is

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When the general denial is pleaded to an action against the defendant as the drawer of a promissory note annexed to and made a part of the petition, any variation between the name of the drawer as signed to the note and the defendant's name as described in the petition may be reconciled by parol testimony.

sufficient to correct any error in spelling the name of the defendant. By this means, it is in fact a suit against Charles Breux, the signer of the note. He might probably have pleaded the misnomer in abatement; but as he chose to answer generally to the action under the double appellants of Braud or Brand and Breux, both being stated in the petition, in consequence of the annexation of the note, he ought to be considered as having answered in his true name, and the note as annexed should have been received in evidence, under proper proof or admissions, &c.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled; and is further ordered that this case be remanded to said court, to be proceeded in according to law. The appellee to pay the costs of this appeal.

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BOWMAN
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APPEAL FROM THE COURT OF THE FOURTH DISTRICT.

If the appellant, relying on error apparent on the face of the record, fail to assign the order on which he relies within ten days from the filing of the transcript, he cannot do it afterwards, and the appeal will be dismissed.

This was an action brought by the payee against the drawees *in solido*, of a promissory note which was in the following terms: "Plaquemine, La., 5th May, 1831. In all the month of March next, we, or either of us, promise to pay to the order of Elias S. Bowman, the sum of six hundred and fifty-five dollars for value received, with the privilege of delaying the payment hereof for one year longer, by paying ten per cent. interest from the time this becomes due until paid. (Signed) William Jones, Daniel Corcoran, Benjamin W. Wilson."

The defendant pleaded the pendency of an another suit for the same cause of action between the same parties; and on the other suit being withdrawn, the exception was overruled. The cause was then submitted to a jury who returned a verdict against the defendants *in solido*.

The defendants appealed. The clerk certified that the transcript contained copies of all the documents and proceedings had in the cause. No testimony was taken in writing at the trial, nor was there a statement of facts agreed on or made by the judge *quo*. The transcript was filed on 1st of July, 1833, and on the 9th of January, 1834, the assignment of error was made.

Nicholls, for plaintiff and appellant, assigned for error apparent on the face of the record that:

1. A final judgment has been rendered against the appellant, without having previously taken a judgment by default. *Code of Practice*, 409.

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Ives, for defendant and appellee, moved to dismiss the appeal:

1. Because there is no ground for appeal except an assignment of errors which was not made according to law, and the appeal must be rejected. *See Code of Practice, art. 897.*

2. The appellant cannot rely wholly or in part on a statement of facts, an exception to the judges' opinion or special verdict; for by an inspection of the reverse, it will appear that there was no statement of facts; no testimony taken down in writing, no exception to the judges' opinion, no special verdict, and the appellant has not within ten days after the record was brought up, filed a written paper stating, specially or otherwise, any errors of law apparent on the face of the record.

MARTIN, J., delivered the opinion of the court.

The defendant and appellant prays the reversal of the judgment on the ground, that a final judgment was taken without a judgment by default having been previously obtained.

The plaintiff and appellee has prayed for the dismissal of the appeal, as the appellant relies only on an error apparent on the face of the record, which was not assigned till after the period fixed for such an assignment by the *Code of Practice*. There is no statement of facts, bill of exception, or special verdict.

If the appellant, relying on error apparent on the face of the record, fail to assign the error on which he relies, within ten days from the filing of the transcript, he cannot do it afterwards, and the appeal will be dismissed.

The *Code of Practice*, 897, provides that "the appellant who does not rely wholly or in part on a statement of facts, an exception to the judges' opinion, or a special verdict to sustain his appeal, but an error apparent on the face of the record shall be allowed to allege such error, if within ten days after the record is brought up, he files in the Supreme Court, a written paper stating specially such error, as he alleges; otherwise his appeal shall be rejected."

The record of this case was brought up on the 1st July,

1833,, the appellant filed no point or plea till the 9th of January, 1834, when he alleged the error on which he had built on hopes, for the reversal of the judgment.

Two terms of this court, viz: November and December, elapsed and eight judicial days in January, between the period of bringing up the record and the day on which the appellant assigned the error.

This appeal, therefore, in the language of the *Code of Practice*, must be rejected.

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GILBERT vs. HIS CREDITORS.

APPEAL FROM THE FIRST JUDICIAL DISTRICT.

The words "third persons" in the article 3315 of the *Louisiana Code*, include all who may be interested in the pecuniary standing or solvency of the person against whom mortgages exist, and consequently it includes creditors of every description who may have dealt with the mortgaging debtor in good faith, whilst in ignorance of or before the existence of the right claimed by mortgagee creditors.

The article 3323 of the *Louisiana Code*, implies that mortgages valid against the creditors may be given if they be executed at a time when the debtor is not in failing circumstances.

A mortgage given and inscribed at any time previous to the three months immediately preceding the failure of a debtor, will not be presumed fraudulent.

All dealings between persons are presumed to be in good faith which take place while neither of the parties is in failing circumstances.

Where the record does not show by evidence the length of time which elapsed between the inscription of a mortgage and the failure of the mortgagor, it must be viewed as having been made at a period not suspicious.

If it is impossible to reconcile satisfactorily the discrepancies of several articles of the *Code*, full effect will be given to the last in the order of their arrangement.

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By the tableau of distribution filed by the syndic of the creditors of Thomas Gilbert, it appeared that there were assets in his hands to the amount of five thousand one hundred dollars. The privileged claims for costs, commissions, &c. amounted to one thousand one hundred and ninety-nine dollars ninety-five cents. Wallace, Lambeth, and Pope were placed on the tableau as privileged creditors to the amount of two thousand seven hundred and seventy-three dollars thirty cents, for the balance of monies furnished for repairs of steam boat President, secured by mortgage. Several other creditors were placed on the tableau for materials furnished to the same steam boat for sums, all of which together with the mortgage claim equalled the amount of the funds.

Several oppositions were filed to this tableau. John Stacker opposed it, alleging that he was a privileged creditor of the highest order, and should be paid before any other creditor for five thousand dollars and upwards. He denied the alleged debt of Wallace, Lambeth and Pope. His claim was founded on a conventional mortgage executed by the insolvent on the 9th of April, 1831, and inscribed in the office of the register of mortgages, on the 8th of June, 1832. This mortgage was executed to Benjamin F. West, who on the 7th of June, 1831, subrogated Stacker to all his rights therein.

Wallace, Lambeth and Pope, produced a mortgage of Gilbert to them, bearing date on the 2d of January, 1832. It was recorded on the 9th of the following June. Several of the claimants for materials furnished for the steam boat President, produced testimony of the correctness of their charges.

The judge *a quo* overruled Stacker's opposition as regards *bona fide* creditors whose claims existed prior to the day on which the mortgage was recorded, and maintained it as to the claims of creditors since the time of inscription. The claim of Wallace, Lambeth and Pope, was postponed as regards creditors prior to the inscription of their mortgage, and maintained as to subsequent creditors.

Wallace, Lambeth and Pope, appealed.

Slidell, for the appellants.

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Hennen, for Stacker, an opposing creditor.

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1. The recording of the acts of Stacker was prior to that of all other creditors, and gives him a preference over all who recorded their acts subsequent to him.

2. The recording of the acts of Stacker avails him against all other creditors.

MATHEWS, J., delivered the opinion of the court.

In this insolvency oppositions are made by several of the creditors to the homologation of a tableau of distribution filed by the syndic. On the tableau the appellants are placed as mortgagee creditors to the amount of \$2773 30. Their claim to any preference under the mortgage is opposed by creditors, some chirographic and others claiming privileges, &c. The court below in deciding on the opposition of John Stacker to the tableau, a creditor who claimed a preference by mortgage, decreed that neither he nor the appellants were entitled to any preference over the ordinary creditors, in consequence of the late period of recording their mortgages. These parties both complain of the judgment as being in this respect erroneous, and insist on the respective preferences by them claimed.

The first question to be settled relates to the correctness of the judgment, denying the preference as claimed by these mortgage creditors. The judge *a quo*, bases his decision on the 3320th art. of the *La. Code*, found in the title which treats of mortgages. To understand the meaning of this article, it is necessary to recur to several of the preceding articles. The article 3314 states the manner in which conventional, judicial, and legal mortgages are acquired, and declares that such mortgages are allowed to prejudice third persons, only when they have been publicly inscribed on records kept for that purpose in the manner directed by subsequent articles. In the French part of the code, which is more intelligible in the present instance, the expression is *que autant qu'elles ont été rendues public par leur inscription, &c.* The 3315 art.

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defines the meaning of the terms third persons as used, and designates all persons to be such who are not parties to the act or the judgment on which the mortgage is founded. The arts. 3317, 3318, and 3319, point out the manner in which mortgages must be recorded; and if done as required they have effect from the date. The inscription is to be made within six days, with an allowance of certain additional terms for distance from the place of recording. The art. 3320 declares that if the creditor allows the time to elapse without causing the act or judgment to be recorded, his mortgage shall have effect against third persons dealing in good faith, only from the day when he shall have caused the inscription to be made. Now we have already ascertained by the art. 3315, that by the words *third persons*, as used in this section of the code, are to be understood all persons who are not parties to the act or to the judgment on which the mortgage is founded. The general expression,

The word "third persons" in the article 3315th of the *Ls. Code*, include all who may be interested in the pecuniary standing or solvency of the person against whom mortgages exist, and consequently it includes creditors of every description who may have dealt with the mortgaging debtor in good faith, whilst in ignorance of or before the existence of the right claimed by mortgage creditors.

all persons, certainly embraces all who may be interested in the pecuniary standing or solvency of the person against whom mortgages exist; and consequently creditors of every description will be included, who may have dealt with the mortgaging debtor in good faith, whilst in ignorance of or before the existence of the right claimed by mortgage creditors.

This doctrine carried to its full extent, will destroy the preference intended to be secured by conventional mortgages over other creditors who were such at the time when the contracts of mortgage were made between the debtor and creditors claiming such preference. And the same want of preference would probably take place even in judicial mortgages in relation to persons who were creditors before the judgment was rendered and recorded.

An interpretation which gives this effect to the articles of the code now under consideration, does violence to the maxim which establishes the principle, that *vigilantibus non dormientibus subveniunt leges*, but is in accordance with another principle of our jurisprudence by which the property of a

debtor is considered as a common pledge to all his creditors in the event of failure.

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If these provisions of law stood alone, they would probably admit of no other fair interpretation except that which leads to the result just stated. But there are subsequent provisions in this code from which an implication follows, that mortgages valid against other creditors may be given if they be executed at a time when the debtor is not in failing circumstances, and even under these circumstances on proof that the creditor paid, in obtaining the mortgage a real and effective value at the moment of the contract. See art. 3323. The art. 3325 relates to the inscription of judgments, and the following article declares that any inscription made after the failure of a debtor, or on the day preceding it, shall have no effect whatever against other creditors. From these articles an irresistible implication results, that mortgages given and inscribed at any time previous to the three months immediately preceding the failure of a debtor would not be presumed fraudulent.

The article 3323 of the La. Code, implies that mortgages valid against the creditors may be given if they be executed at a time when the debtor is not in failing circumstances.

A mortgage given and inscribed at any time previous to the three months immediately preceding the failure of a debtor, will not be presumed fraudulent.

There is an apparent contradiction between these articles and the 3320th; can they be reconciled? If it be possible to give effect to the provisions of both, just principles of legal interpretation require it should be done.

It is clear that a mortgage gives no preference to a mortgagee creditor over others, except from the date of its inscription, unless this be done within the time prescribed by law which extends its effects to the date of the act. In the present case the mortgages under which the parties claim a preference were not recorded in due time. The preference claimed therefore, commenced only from the dates of inscription against third persons dealing with the debtor in good faith. All dealings between persons are presumed to be in good faith which take place when neither of the parties to a contract is in failing circumstances. But a contract of mortgage may be relieved from its legal taint of fraud by showing that value was paid at the time of the contract by the mortgagee even when made and inscribed *in tempo inhabil*. The law raises a presumption of fraud

All dealings between persons are presumed to be in good faith which take place when neither of the parties is in failing circumstances.

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When the record does not show by evidence the length of time which elapsed between the inscription of a mortgage and the failure of the mortgagor, it must be viewed as having been made at a period not suspicious.

only in relation to mortgages both given and inscribed at a time suspicious. Such as are given previously, are to be considered as having been executed *bona fide*, unless the contrary be shown by evidence. Our laws, however, reprobate all contracts between a debtor about to fail and part of his creditors, to the prejudice of others; consequently all acts done at such a time ought to be avoided and annulled; and probably even the inscription of a mortgage made under such circumstances would be without effect against other creditors. In the present instance the record as brought up, does not show by any evidence, the length of time which elapsed between the inscription of the mortgages, and the failure of the debtor. They must therefore be viewed as not having been made at a period inauspicious. In cases where a fair value is paid to the debtor who gives a mortgage on his property, his estate is not injured by the contract, and the pledge for payment to the mass of his creditors is consequently not diminished. And in the event of failure, justice requires that persons who have been vigilant in securing themselves by hypothecations, should be preferred to mere chirographic creditors.

In pursuance of a just interpretation of all the provisions of the code relating to the subject under consideration, we are of opinion that the court below erred in refusing the preference claimed by the appellants and the opposing creditor Stacker. Although we may perhaps not have succeeded fully in reconciling the apparent discrepancy in these provisions, full effect is however given to the last, which is in conformity with the maxim that *leges posteriores priores contrarias abrogant*.

If it is impossible to reconcile satisfactorily the discrepancies of several articles of the code, full effect will be given to the last in the order of their arrangement.

It only remains for us to settle the dispute about preference between the mortgagee creditors. This is not a difficult task. Neither of their mortgages was recorded within the time limited by law. They must therefore take effect and give preference from the respective dates of their inscription. If these creditors had caused their mortgages to be inscribed on the same day the rights would have been concurrent. See art. 3321 of the code. But Stacker's was

recorded one day earlier than that of the appellants. His claim must consequently be preferred to theirs; and they be preferred to creditors who have neither privilege nor mortgage.

It was contended in the course of argument, that the opposing creditor Stacker, has not proved the genuineness of his claim. The evidence to support it is a notarial act of mortgage given to Ben. F. West, which was transferred to the claimant by a public act, and the honesty of the claim is no where put at issue upon the record.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court, so far as it referred the preferences claimed by the appellants Wallace, Lambeth and Pope, and by the opposing creditor Stacker, be avoided, reversed, and annulled. And it is further ordered, adjudged, and decreed, that these creditors be placed on the tableau of distributions of the insolvent's estate, as entitled to a preference under their mortgages over mere chirographic creditors. The opposing creditor Stacker, to take rank of and be preferred to the appellants.

STEWART vs. PAULDING.

APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT.

In an action by the vendor against the vendee of real estate, adjudicated at public auction, the plaintiff's request to the defendant that he would comply with the terms of the sale, and the defendant's refusal to do so, is insufficient to put the latter in default.

The plaintiff sold at public auction a lot of ground with its improvements, situated in suburb St. Mary, at the corner

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of Gravier and Baronne streets, in the city of New-Orleans, measuring sixty-nine feet on Baronne street, one hundred and one feet and seven inches on Gravier street, and one hundred twelve feet and ten inches on the line adjoining Mr. Mioton. The defendant became the purchaser for eleven thousand and eight hundred dollars, payable in six twelve and eighteen months to be secured by endorsed paper and mortgage on the premises.

The petition charged that since the sale, the defendant had refused to abide by the adjudication thus made to him, and to comply with the conditions of the sale. That the plaintiff had since caused the lot to be sold at auction, for the defendant's account. At the second sale it was adjudicated for the sum of ten thousand dollars. This action was brought to recover one thousand and eight hundred dollars, the difference in the prices at the two sales.

No answer was filed, and judgment by default was taken and afterwards confirmed.

The defendant obtained a rule *nisi* to set aside the judgment. On the return of the rule, A. Hennen, Esq., a witness for the defendant, testified that the plaintiff's counsel had informed him that the suit had been brought, and if no answer were filed, judgment would be taken. Witness mentioned these facts to defendant, who in the absence from the city of witness, had employed the late S. Hill, Esq., as counsel to defend the cause.

The defendant in his affidavit stated that he had a good defence on the merits, and specified several grounds on which he had intended to rely. He also stated that the plaintiff had acceded to his wish to annul the sale as defendant had been informed by his counsel, S. Hill, Esq., who soon afterwards died. The defendant believed that his said counsel had taken all requisite legal steps to secure his rights.

The motion for a new trial was overruled, and no testimony having been taken by the clerk in writing, and the parties not agreeing on a statement of facts, the judge *a quo* furnished one.

Isaac L. McCoy, testified that the property had been adjudicated, as stated in the petition, to the defendant. "That defendant when applied to by witness, always refused to comply with the terms of sale; that defendant was notified that if he did not comply with the terms of sale, the property would be sold again, and at his risk." The lot was accordingly sold a second time, in presence of defendant. The first sale was made for eleven thousand eight hundred dollars, and the second for ten thousand dollars.

The defendant then appealed.

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De Armas, for plaintiff and appellee, contended that:

1. No statement of facts can be drawn up after judgment by default is affirmed. *Code of Practice*, art. 602 and 603.
2. No demand for nullity of a judgment can be made but by a regular action. *Code of Practice*, art. 604.
3. Judgment ought to be confirmed by testimonies not on record.

Hennen, for the defendant and appellant, contended that:

- 1 The allegations of the petition are not sufficient to maintain the action.
2. The proof does not make out any cause of action.
3. There was no legal citation served on the defendant; none of the legal formalities of a citation being complied with, as is apparent on the face thereof.
4. The judgment by default should have been set aside, for the reasons detailed in the affidavit of the defendant.

MATHEWS, J., delivered the opinion of the court.

This action is founded on the 2589th article of the Louisiana Code, found in the chapter which treats of sales by auction, &c. The suit is brought to recover the difference in the price of immovable property, which had been adjudicated

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to the defendant, who, as alleged, is the proprietor, refused to comply with the terms of sale; and in consequence of this refusal, the auctioneer sold the property a second time at his risk, for a price less than was obtained at the first adjudication.

The defendant suffered judgment to be entered by default, which was afterwards made final, on hearing of testimony in the cause. From this judgment he appealed, and obtained a statement of facts, made out by the judge *a quo*, the parties having refused to agree to one.

Under this statement of facts, it is contended on the part of the appellant, that the plaintiff failed to show any cause of action, not having produced any evidence to establish that the defendant was legally put in default, *in mora*, in respect to the performance of his part of the contract.

The first time we were required to investigate this subject was in the case of *Erwin vs. Fenwick*, to be found in 6 *Mar. N. S. p. 229*. We there expressed an opinion that the rules relating to the steps required to be taken in order to place a debtor *in mora*, considered in regard to some of these provisions, are entirely arbitrary; but being imperative must be obeyed by those who administer justice under the law. The sale to the defendant implied a commutative contract; it was on credit, and the vendor was bound to give his notes for the payment of the price, and the plaintiff to convey to him the property sold, which being an immovable, required a written act of sale, according to the *art. 1907* of the *La. Code*. In commutative contracts when the reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party who wishes to put the other in default, must, at the time and place expressed in or implied by the agreement, offer to perform as the contract requires, that, which on his part, was to be performed, or the opposite party will not be legally put in default. The article 2588 states, that if the object adjudged by auction, be one for which the law requires that the act of sale shall be made in writing, the purchaser may retain the price, and

the seller the possession of the thing, until the act be passed, **EASTERN DIS.**
&c. &c. *January, 1894.*

The statement of facts in the present case, does not show that any act of sale, in writing, of the property, was passed or offered to be passed, by the seller. The only testimony adduced on this matter, is that of the auctioneer, who testified that the defendant, when requested by him, refused to comply with the terms of the sale. But this was not sufficient to put him in default, according to the 1907th art. of the Code above cited, for the plaintiff did not offer to perform that which on his part was to be performed, viz: to make the deed of conveyance. This case does not differ in any material circumstance from that cited from 6 N. S. See p. 235.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled; and it is further ordered, that judgment be here entered against the plaintiff and appellee, as in case of nonsuit, with costs in both courts.

In an action by the vendor against the vendee of real estate, adjudicated at public auction, the plaintiff's request to the defendant that he would comply with the terms of the sale, and the defendant's refusal to do so, is insufficient to put the latter in default.

MOORE
vs.
GIBSON.

MOORE vs. GIBSON.

APPEAL FROM THE COURT OF THE SECOND DISTRICT

If the appellant rely on errors, apparent on the face of the record, and fail to make the assignment within the ten days next following that of filing the transcript of the record, the appeal will be dismissed.

This action was brought to obtain the seizure and sale of certain lands, situated in the parish of Terre Bonne, and a slave, mortgaged to secure the payment of the purchase money, of which a balance of three thousand two hundred and sixty-two dollars and seventy-five cents, was claimed to be due.

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GIBSON.

The defendant, Gibson, presented his petition, denying that the formalities of the law had been pursued in obtaining the order of seizure, and demanding the rescission of the sale, on the ground of error, induced by the vendor; and obtained an injunction, staying proceedings on the order of seizure and sale. To this demand, and the other allegations of the defendant, the original plaintiff, Moore, pleaded a general denial.

Moore had judgment in the inferior court, for the claim, with damages against Gibson and his sureties in the injunction bond. Gibson appealed.

The clerk certified "that the foregoing transcript is a true and literal copy of all the proceedings, as well as of all the documents filed in the suit of S. G. Moore *vs.* T. A. Gibson." The record was filed on the 3d of June, 1833. Error on the face of the record was assigned on the 20th of January, 1834.

Wheeler and Taylor, for plaintiff and appellee, moved to dismiss the appeal.

1. The certificate is insufficient, inasmuch as it does not state that the record contains all the evidence adduced by the parties. *Code of Practice*, arts. 586, 602 and 896. *Ditto vs. Barton*, 6 N. S. 127. *Trenchard vs. Elderkin*, 3 La. Reports 294.

2. The appeal must be rejected, because there is no assignment of errors of law appearing on the face of the record. *Code of Practice*, art. 897. *Rule 4th of the Supreme Court.*

Nicholls, contra.

The court erred in compelling plaintiff in injunction to proceed to trial, in the absence of his counsel.

MARTIN, J., delivered the opinion of the court.

The appeal in this case must be dismissed, the record or transcript filed in this court by the appellant, is not certified

as containing all the evidence adduced at the trial. There is no statement of facts, no bill of exceptions or special verdict, and the appellant has suffered ten days to elapse since the record was filed, without making any assignment of errors. *Code of Practice*, 586 and 896. 6 *Martin*, N. S. 127. 3 *La. Reports* 294.

It is, therefore, ordered, adjudged and decreed, that this appeal be dismissed, with costs.

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February, 1834.

HEIRS, ETC. OF
PACQUETET
VS.

MOSSY ET AL.

If the appellant rely on errors, apparent on the face of the record, and fail to make the assignment within the ten days next following that of filing the transcript of the record, the appeal will be dismissed.

HEIRS, &c. OF PACQUETET vs. MOSSY ET AL.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF NEW-ORLEANS.

Where a contrariety in names of the heirs and persons giving a power of attorney to recover the estate for them, in that capacity, is reconciled by satisfactory testimony, received in the court below without objection, the Supreme Court will not disturb the judgment.

The petition alleged that François Bernard Pacquetet, died in New-Orleans in 1832, having made his olographic testament, instituting certain persons his universal heirs and legatees, all of which, with the exception of one who was dead, lived in France; that the plaintiffs were appointed the attorneys in fact of the said legatees and heirs, to take possession of the estate. The testamentary executor and attorney for absent heirs, were made defendants. Documents were annexed to the petition, to show the powers of the plaintiffs, and the quality of the persons giving them.

The executor denied that the plaintiffs could claim the estate in their own names, and he required evidence of the alleged heirship and quality.

Judgment was rendered for the plaintiffs, from which the executor appealed.

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**HEIRS, ETC. OF
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MATHEWS, J., delivered the opinion of the court.

In this case the heirs and legatees, by their attorney in fact, sue the executor of the last will and testament of François Barnard Pacquetet, to cause an account to be rendered by the defendant, and to recover from him possession of the testator's succession.

Judgment was rendered against the executor in the court below, from which he appealed.

The rendition of the account and payment of the funds of the estate to the plaintiffs, are opposed by the defendant before this court, entirely on the ground, that the persons who sent their procuration to the attorneys in fact, are not the heirs of the testator, nor those designated in his will, as heirs or legatees.

There does appear to be some difference between the names written in the testament, and those of the constituents who forwarded their authority to collect their inheritances and legacies.

Where the contrariety in names of the heirs and persons, giving a power of attorney to recover the estate for them, in that capacity, is reconciled by satisfactory testimony, received in the court below without objection, the Supreme Court will not disturb the judgment.

The contrariety in those names, is, however, not very great, and the identity of the persons who gave the power to call the executor to account, and receive the funds of the estate, with those named in the will, is established by written documents and testimony, which were received in the Court of Probates without opposition, and afford the evidence on which that court based its judgment. We have examined that evidence, and are of opinion that the judge *a quo*, did not err in his conclusions on the facts of the case; and as it presents no questions of law.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, costs to be paid out of the succession.

Derbigny, for appellants.

Morphy, *contra*.

TURNER vs. PULLY.

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February, 1834.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

TURNER
vs.
PULLY.

The articles of the *Louisiana Code*, relative to putting a party in default, do not apply to a claim of damages for an alleged trespass; they relate solely to obligations arising out of contracts.

The plaintiff averred that he was the lessee and occupant of two warehouses, situated on the batture, in front of suburb Delor, of the city of New-Orleans, and that the defendant in the years 1831 and 1832, had at divers times committed various trespasses on the property; that he had thrown various obstacles in the way of the peaceable enjoyment of the plaintiff, particularly as to the landing in front of the premises, by placing there rafts and other obstructions, by which the plaintiff had sustained damages amounting to five hundred dollars.

The defendant pleaded the general denial, and that he had not been legally put in default.

The cause was submitted to a jury, by whom a verdict was returned for the plaintiff. Judgment having been rendered, the defendant appealed.

MATHEWS, J., delivered the opinion of the court.

This is a suit in which remuneration is claimed for damage, alleged to have been caused by the defendant to the plaintiff, by improperly interrupting the landing in front of the warehouse of the latter, by attaching to it, and suffering rafts of timber to remain an unreasonable time at said landing.

The answer contains a general denial, and a plea that the defendant had not been put in default, so as to entitle the plaintiff to any damage. The cause was submitted to a jury in the court below, who found a verdict for the plaintiff, and assessed his damage at one hundred dollars, on which judgment was rendered, and the defendant appealed.

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February, 1894.

TURNER
VS.
FULLY.

The decision of the case depends principally on matters of fact, and on the facts, after a strict examination of the testimony, we are unable to discover any good reasons to differ from the jury in their conclusion. The question raised by that part of the answer which denies that the defendant was put in *morâ*, previous to bringing the suit, must be solved by an interpretation of the articles of the *La. Code*, which treat of the modes in which debtors may be put in default, &c.

The articles of the *Louisiana Code*, relative to putting a party in default, do not apply to a claim of damages for an alleged trespass; they relate solely to obligations arising out of contracts.

The present action is commenced to recover damages for an alleged trespass; consequently it is believed that the articles of the code above referred to, do not apply to the case. See them from 1904 to 1913. They are found in the second section of the chapter which treats of the effect of obligations, and from their entire context, they seem to have reference solely to obligations arising out of contracts. But in the present suit, the evidence shows that the defendant was requested to remove the impediments, which had been placed by him, to the free use of the landing in front of the plaintiff's property, and this at the instance of the latter.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

Martin and Schmidt, for plaintiff and appellee.

Preston, for defendant and appellant.

COMMAGERE vs. GALLY ET AL.

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February, 1834.

COMMAGERE
vs.
GALLY ET AL.

APPEAL FROM THE PARISH COURT OF THE PARISH AND CITY OF NEW-
ORLEANS.

The prescription of four years, relating to actions of minors against their tutors, is only applicable to accounts rendered by tutors. It relates to acts of a tutor, such as he may do in pursuance of his official power or authority, and such as would be ratified when legally done. The sale of property made as belonging to the seller, is not an act of this kind.

The plaintiff alleges he is the son of Pierre Commagère and Françoise Frilonx, both deceased: that his mother died intestate, in 1800; that she had brought in marriage the sum of one thousand four hundred and eleven dollars; that during the marriage, a certain lot of ground was purchased by his parents, which after his mother's death, was sold to Madam Mercier, for eleven thousand two hundred and fifty dollars.

The plaintiff claims on account of his share of his mother's dotal effects, a mortgage on a lot, which he alleges was sold by his father, in fraud of the rights of the minor children of whom the plaintiff was then one.

He claims the rescission of the sale of the lot, because it belonged to the community of acquets and gains, and was sold by his father without having pursued any of the legal formalities. His father died in 1829, having rendered no account of his tutorship.

The present occupant and those under whom he claimed were all made defendants, and judgment prayed against them for the lot of land, with the value of its fruits and revenues.

To this claim, the lapse of four years, since the plaintiff arrived at his majority, was pleaded as a bar against any claim of the plaintiff, arising from his father's administration of his affairs.

The record contains, among other orders, the following:

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"It is ordered by the court, that this defendant be admitted to plead the prescription of ten years.

Judgment was rendered for the defendant on the exception, and the plaintiff appealed.

Fourchy and Magnin, for plaintiff and appellant.

The prescription of four years, alledged in the defendant's exception, which was the basis of the judgment rendered by the court below, is not applicable to this case.

Lockett, contra.

MATHEWS, J., delivered the opinion of the court.

This suit is brought by the plaintiff, as heir to his deceased mother, to recover certain real estate, and the annual fruits and profits thereof for many years in arrear; which estate he alleges, was community property belonging to his father and mother at the time of the death of the latter, and was administered and sold by the former as his natural tutor, without pursuing the formalities required by law, and who died without rendering any account of his administration. The petition is prolix and argumentative in so much, as to render it somewhat difficult, to ascertain clearly the objects of the claimant; but these are pretty evident viz: to have the sale made by the plaintiff's father declared null, to recover the property sold, and the fruits and profits, during the time it has been in the possession of the different vendees.

To this action, the prescription of four years is pleaded, as provided in the article 356 of the *La. Code*, which corresponds with the article 77, found in the *Old Code*, p. 72. This plea was supported by the court below. The plaintiff appealed.

These articles of our code, are similar to the article 475 of the *Code Napoléon*, except that the prescription established by the *French Code*, is ten years. A prescription of this nature, according to the jurisprudence of France, is perhaps only applicable to accounts rendered by tutors. It

relates to acts of a tutor, such as he may do in pursuance of his official power or authority, and such as would be ratified when legally done. See *Pailliet's Note*, on the article cited from the *Code Français*. The decisions of this court, in relation to the prescription of four years, against the pursuit of minors, after having arrived at the age of majority, touching the acts of their tutors, have established principles, in accordance with those which seem to prevail under the provisions of the *French Code*. The acts spoken of, are acts of tutorship and the sale of property made, as belonging to the seller, can never be considered as an act of this kind. Whether the prescriptions of ten, twenty and thirty years might have been pleaded, and would have prevailed, cannot be inquired into; for they have not been regularly pleaded either in the appellate court, or that of the first instance. No other prescription except that of four years, which relates to the actions of minors against their tutors, seems to be relied on by the defendants, which we are of opinion is not applicable to a case like the present. See *Martin's Rep.*, vol. 8, p. 619. 10 do., p. 287 and 1 N. S., p. 334.

Believing, as we do, that the court below erred, in sustaining the exception of prescription, as pleaded by the defendants.

It is ordered, adjudged and decreed, that the judgment of the Parish Court, be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the cause be sent back to said court, to be proceeded in *de novo*, according to law. The appellees to pay costs of this appeal.

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The prescription of four years, relating to actions of minors against their tutors, is only applicable to accounts rendered by tutors. It relates to acts of a tutor, such as he may do in pursuance of his official power or authority, and such as would be ratified when legally done. The sale of property made as belonging to the seller, is not an act of this kind.

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NETTLETON vs. STEPHENS.

NETTLETON
vs.
STEPHENS.

APPEAL FROM THE COURT OF THE SECOND DISTRICT.

The clerk's certificate that the record contains a full transcript of all the pleadings, proceedings, documents, and evidence on file in the case, does not authorise the conclusion that all the evidence adduced, was put on file and is therefore insufficient.

This action was brought by one of two joint vendors of certain real estate in the parish of Lafourche, to recover his portion of certain instalments of the purchase money.

The defendant excepted that the debt claimed was indivisible, and that the heirs of the co-vendor should have been made co-plaintiffs. The exception was overruled, and the defendant filed his answer to the merits, pleading the general denial and several special pleas.

Judgment was rendered for the plaintiff for one thousand five hundred dollars, from which the defendant appealed.

The clerk's certificate was in the following words: "I the subscribing clerk of the second judicial District Court, sitting in and for the interior parish of Lafourche, certify the foregoing a true transcript of all the pleadings, proceedings, documents, and evidence on file, and of all the orders on record in the said court in the case," &c.

The record was filed in the Supreme Court on the 27th November, 1833.

The appellant filed his points on the 20th of January following.

Taylor, for plaintiff and appellee.

1. By the stipulations of the act of sale, Stephens had a right to part from the two first payments of two thousand dollars each for one year from the time they became respectively due, if his crops were not sufficient to pay after deducting expenses. The occurrence of the event on which the right to part from depended, is not proved. The debt

was not indivisible, but payable to the vendors by halves according to the terms of the act of sale. EASTERN DIS.
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2. The plaintiff cannot be delayed by the mere suggestion of defect of title contained in defendant's answer. Stephens must pay the price, because if the title was defective, he has not brought himself within the rule, since he does not allege he has *just reason* to fear he will be disquieted. *Faulk vs. Woolbridge, La. Rep. 2, 09. Civil Code, 2535.*

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3. No deficiency in the quantity of the land sold is shown. If there had been a deficiency, Stephens would not be entitled to a diminution of price, for it was sold from boundary to boundary for a round sum. *Civil Code, 2468, 2471.*

4. Mrs. Anderson and Mr. Nettleton renounced their mortgages. *Civil Code, 2038.*

5. The judgment of the inferior court must be affirmed with damages; since there is no ground for an appeal, and because also the record is not certified according to law, there is no statement of facts, bill of exception to the opinion of the judge, special verdict, or assignment of errors appearing on the record, so that the correctness of the tribunal of the first instance cannot be examined. *Code of Practice, 586, 597. Nichols vs. Peytavin, 7 N. S. 608. Pugh vs. Erwin, 6 N. S. 159.*

Nicholls, contra.

1. The court erred in overruling the interrogatory propounded by defendant.

2. The court erred in refusing to order a survey.

3. Plaintiff had no right of action without having tendered previous release, and which he never had the power to grant.

MARTIN, J., delivered the opinion of the court.

This appeal must be dismissed at the appellant's costs. The certificate of the clerk states that the record contains a

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LABARRE.

The clerk's certificate that the record contains a full transcript of all the proceedings, documents, and evidence on file in the case, does not authorise the conclusion that all the evidence adduced was put on file, and is therefore insufficient.

full transcript of all the pleadings, proceedings, documents, and evidence on file in the case. There is no statement of facts, bill of exceptions, special verdict; and the appellant has suffered the period fixed by law to pass, without any assignment of errors apparent on the face of the record. Nothing authorises the conclusion, that all the evidence adduced was put on file.

It is, therefore, ordered, adjudged, and decreed, that this appeal be dismissed with costs.

ELLIOT ET AL. vs. LABARRE.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The same judgment which has been rendered against the possessor of property, for rents accruing after judgment of eviction from the premises will be rendered against his vendor.

This case now comes before this court on the second appeal. For a statement of the facts on which the first appeal was taken and the decision of the court see 5 *Louisiana Reports*, 223.

After the cause was remanded the plaintiff proved the possession of the premises as alleged, from the 1st April 1831 to the 10th June, 1832, and that the rent was worth thirty-two dollars per month.

The plaintiff had judgment for four hundred and fifty-five dollars. Judgment was also rendered in favor of the defendant and against her vendor cited in warranty, who appealed.

Hennen, for plaintiff and appellee.

Soulé, for defendant and appellant.

MARTIN, J., delivered the opinion of the court.

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This case was remanded from this court in March, 1833. 5 *Louisiana Rep.* After a revisal of a judgment of the district court, who had erroneously, in our opinion, concluded that a former decree of ours, 4 *id.* having passed on the claims of the plaintiffs for rent, afforded a plea of *res judicata*, as to any rent accruing after the judgment of the District Court which had been brought before us and had been examined in this court.

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From the judgment of the District Court, allowing to the plaintiff the rent from the date of the former judgment of the District Court, the present appeal is taken, by Longpré the defendant's vendor, called in warranty, against whom judgment was given in favor of the original defendant.

The same judgment which has been rendered against the possessor of property for rents accruing after judgment of eviction from the premises, will be rendered against his vendor.

His counsel has not made any defence in this court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

EXECUTORS OF HART vs. SCHMIDT, ATTORNEY, &c.

APPEAL FROM THE COURT OF UOURT OF PROBAPES FOR THE PARISH OF
NEW-ORLEANS.

Where three executors were appointed with joint and several powers in relation to the settlement and liquidation, and when that should be effected, they were to account to and place the funds of the estate in the possession of one of their number; held that to carry into effect the intentions of the testator thus expressed, a sale of the property was indispensable.

This action was brought by the executors of Samuel Hart, deceased, against the attorney for the absent heirs, to obtain a sale of the real estate of the succession; which sale the plaintiffs averred, was necessary for the execution of the will. The clauses of the will relied on are recited at length in the statement of facts in the case of the same plaintiffs vs. Boni, f. w- c. ante, 97

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The defendant denied the allegations of the petition.
The judge *a quo* ordered the sale. The defendant appealed.

Schmidt, for defendant and appellant.

1. The executors are not authorised to sue as required.
C. Code, art. 1661, 1662.

2. The functions of the executors having expired, they have nothing further to do with the estate, unless continued in them, which can only be done by an order of the court and upon giving security. *Art. 1667.*

Peirce, contra.

MATHEWS, J., delivered the opinion of the court.

This is an appeal from an order of the court below authorising the executors to sell the property belonging to the succession of the testator.

When three executors were appointed with joint and several powers, in relation to the settlement and liquidation, and when that should be effected, they were to account to and place the funds of the estate in the possession of one of their number; held that to carry into effect the intentions of the testator thus expressed, a sale of the property was indispensable

The will does not expressly give to them authority to sell, but it contains provisions relating to the management of the estate of the deceased, which in our opinion requires the sale of the property. Three executors were appointed by the testator with joint and several powers in relation to the settlement and liquidation of the succession; and when that should be finished they were to account and to place the funds of the estate in the possession of one of their number; to carry into effect the intentions of the deceased thus expressed, a sale of the property appears to be indispensable.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed.

PARKER vs. PORTER, ET ALS.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The clause of the act of Congress relating to the obstruction of the passage of the mail, is of a penal character, and in its application to individuals, charged with a violation of it, must be strictly construed; and certainly not with less strictness when it is sought under its provisions to protect from the pursuit of creditors the vessels usually employed in the transportation of the mail, in derogation of a right recognised by the laws of the state.

It is not enough that in consequence of the seizure, the mail contractor was put to inconvenience in complying with his contract, and that there ensued a delay in the departure of the mail, the seizure itself must be a wilful obstruction.

This action was brought against William A. Bradley and Edwin Porter, both residents of the District of Columbia, and William D. Stone, residing in Mobile, carriers of the United States mail under the firm of Porter, Stone & Co. The claim was for iron work and machinery furnished by the plaintiff for four steam boats, the Long Branch, John Morris, William T. Barry, and Star of the West, which boats were at that time in the employ of the defendants. They drew on Bradley for two thousand dollars in favor of the plaintiff, and this amount was credited upon the account. The bill was protested for non-payment. The sum claimed on the protested bill and damages at ten per cent. and balance of the account amounted to three thousand one hundred and fifty-nine dollars.

An order of attachment issued, and the steam boats Long Branch and Watchman were seized.

On an affidavit of Charles Walker that the Long Branch, of which he was the captain, was then engaged in transporting the mail by a contract between the defendants and the post master general of the United States, and that the detention under the seizure would impede and stop the

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transportation of the mail, the judge *a quo* ordered her immediate discharge from seizure. A similar order was made in regard to the Watchman.

On the trial of the rule for the discharge of the Watchman, the plaintiff took a bill of exceptions to the admission of the affidavit of the post master of the city of New-Orleans, stating that the two boats were then employed in the transportation of the mail under contract, and there was no other means of transporting it but in said boats; and that consequently its transportation would be greatly obstructed, retarded, and hindered, if not wholly prevented unless the boats were released.

The plaintiff appealed. The following statement of facts was agreed on by the parties. "Order of seizure and attachment having issued in this case, the steam boats Long Branch and Watchman were seized and attached by the sheriff, in whose custody they now are. It is admitted that said steam boats are now and have actually been for some time past employed in transporting the mail from New-Orleans to Mobile, under a contract with the post master general to that effect; that said steam boats are the private property of the contractors, the defendants, who employ them for the above purpose, it being stipulated by said contract, that said mail shall be conveyed in steam boats between the above mentioned places. It is moreover admitted that the mail bags were put on board the said Watchman for transportation immediately after the seizure and attachment of the same by the sheriff on the 5th Feb. 1834, and was on board at the time of the argument of the rule to set aside such attachment and seizure on the 6th instant, whereon the court ordered the said boat to be released, maintaining the order of seizure and attachment."

Preston, for plaintiff and appellant, contended as follows:

By the laws of Louisiana the process of attachment extends to all the property of a non-resident debtor, without allowing any exception whatever. If then any property of a non-

resident be legally exempted from the process of attachment, the exemption must be found in the laws of the United States constitutionally passed. And as the laws of our state are very explicit and imperative on the courts and its officers, unless the law clearly conflicts with a constitutional act of Congress, it must prevail. It is not pretended that our state law as executed in the present case, conflicts with any other act of Congress than that which has been passed in pursuance of the constitutional power of Congress to establish post office and post roads. Under this power expressly granted, Congress have established post offices and post roads, and as a power necessary and proper to carry into effect that expressly granted, have authorised contracts with individuals for carrying the mails. I do not clearly see the necessity or propriety of Congress carrying the mail, because they have the "power to establish post offices and post roads," inasmuch as the mail could and would otherwise be carried by individuals or the states. At all events I suggest it to the serious consideration of the court, whether under the power to establish post offices and post roads, they can cause the mail to be carried between Mobile and New-Orleans by water; thus establishing the high seas as a post road.

Admitting, however, that Congress have the power to contract for carrying the mail, and by water, as necessary and proper for executing the express grant to establish post offices and post roads; is it necessary and proper that they should exempt the carriages, horses, or vessels of the contractor from liability for their debts? and if necessary and proper, have Congress by law, exempted them from liability?

1. It is not necessary that Congress should exempt the carriages, horses, and vessels of the contractors from attachment and seizure for their debts; because the making a contract with them, implies that they are solvent and able to comply with their contract, without any extraordinary exemptions.

2. Because the government takes bond and security for their compliance with their contracts, and therefore, to ensure compliance, are not necessitated to pass laws which in effect exonerates persons from the payment of their debts.

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3. Because the government can obtain solvent contractors, and therefore, are not necessitated to employ those who are insolvent. They can employ persons who can give the bond necessary to release an attachment, and are not therefore necessitated to employ those who have not sufficient credit to give the bonds necessary to release their property from attachments.

4. Last of all, the government could carry the mails themselves in their own vessels, and are not therefore necessitated to exempt the property of individuals from liability for their debts, in order to have the mail carried.

For all these reasons too, the exemption of the property of individuals from liability for their debts, is not a proper means to be used by Congress in exercising their power to establish post offices and post roads. Such means are peculiarly improper. 1. Because individuals are bound by morality, law, and a regard to their solemn obligations, to pay their debts, and Congress should not by contracting with them in effect, exonerate them from these obligations. 2. A creditor has a sacred right to his debt; the property of his debtor is in the words of our *Civil Code*, the pledge of his creditor. It thus belongs to the creditor and cannot be taken for public use without just compensation. Let us next inquire if Congress has by law prohibited the seizure or attachment of the private property of those who contract to carry the mail, and which is used for carrying the mail. They have not. Such a law would have been expressed in few and simple words, subject to no doubt or controversy. "Horses, carriages, and vessels employed in transporting the mail, shall not be liable to seizure for the debts of the contractors." Congress has legislated often and minutely in relation to the post office department, but such a clause cannot be found in the statutes of the United States.

Without express laws, courts would have been compelled to arrest soldiers and sailors for debt, whatever they might think of the policy of the process. So also members of Congress are by the constitution privileged from arrest while going to or coming from the capitol. But the exception

proves the general rule *exceptio unius est exclusio alterius*. If it required the constitution to except a member of Congress from arrest, the judge can exempt no other person without law.

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It is far more important to preserve that sacred obligation inviolate, than to facilitate the transportation of the mail: Epistolatory intercourse facilitates business and contributes to our pleasure; but the right to receive what is due to us, is a right to live, and to support our families, and to compel men to comply with their obligations and duties is the very end of society. It is urged that the attachment of these mail boats is in violation of the 9th section of the act of Congress passed in 1825, *third Story's Digest*, p. 1987. If so I agree that the attachment should be set aside. On indictment the creditor would plead not guilty, and say I did not knowingly and wilfully obstruct the mail, by attaching the mail boat. The contractors themselves have knowingly and wilfully obstructed the mail, by their faithlessness in not paying my debt and forcing me to attach. They are guilty; I am innocent. I did not retard the passage of the mail by attaching the boat; *the mail* was not on board; I did not retard a driver or carriage, it was *a vessel*, for which the law has not provided. She was at anchor or fast to the wharf. I could not retard the passage of a vessel not under weigh, nor of a mail not in the vessel. Neither the plaintiff or sheriff have violated the section of the act of Congress invoked, and have therefore legally executed the writ of attachment. It cannot be set aside, because the plaintiff has violated no law in exercising a right given to him by law. A temporary stoppage of the mail may have been the consequence of his legal acts; that is not his fault, but the fault of those whose unfaithfulness compels him to resort to legal process.

The stoppage of the mail would, in the hands of proper persons be very temporary, as there is a constant communication between this port and Mobile. Shall the defendants avail themselves of their own wrong and negligence to exempt their property from their debts?

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The defendants advance the proposition that "a creditor has not a right to enforce his private claims to the prejudice of the public interest." The proposition I deny and no authority can be produced in its support. The converse of the proposition is contained in the constitution of the United States. My private right is my private property, and "private property shall not be taken for public use without just compensation." If it be for the interest of the public, that the boats remain in the possession of Porter, Stone & Co., the public can deprive me of my private rights to attach them by giving them a just compensation; that is by paying the debts of Porter, Stone & Co.

The power of the general government over the post office department, is not disputed; but it is perfectly consistent with the power of the states to compel all debtors to pay their debts and comply with their contracts. Indeed the latter power is auxiliary to the former. Those alone who can by their good faith or their property be compelled to pay their debts should be employed in the post office.

The case of *McCullough vs. the State of Maryland*, is cited in defence. The state of Ohio attempted to tax the United States Bank; the State of Maryland to prevent the establishment of a branch within her limits. It was decided that the general government could locate a branch in any state; and that the state could not tax the branch thus located. I do not dispute that the general government may locate post offices and post roads in any state, or contend that the state has a right to tax them. But make the case in relation to the bank similar to the present, suppose it should employ a carriage for the regular transportation of its specie, could not the carriage be attached for its owner's debts. Should they rent a banking house, could it not be seized, &c. for a debt against the proprietor.

The principle that all private property, however employed, can be seized, and the difference between seizing the property of individuals, used in the service of the government itself is illustrated in the case of the *Orleans Navigation Company against the schooner Amelia*, 7th *Martin's Reports*.

Carleton and Lockett, contra, argued as follows:

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By the constitution of the United States, it is provided that "Congress shall have power to establish post offices and post roads." In the same article it is further provided, that Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof." *Con. U. S., art. 1, sec. 8.* Under this grant of power, Congress have enacted, "that if any person shall knowingly and wilfully obstruct, or retard the passage of the mail, or of any driver or carriage carrying the same, he shall upon conviction, for every such offence, pay a fine not exceeding one hundred dollars," &c. *3d vol. Story's Laws, p. 1987, sec. 9.* We shall take it for granted, that this law of the national legislature, is a constitutional exercise of their powers, and is therefore the supreme law of the land, and obligatory upon the state judges. *Con. U. S., art. 6, sec. 2.*

The boat is employed, as is admitted in the statement of facts, for the express purpose of conveying the mail, under contract with the defendants, stipulating that it shall be carried in steam boats. This contract is under a special law of Congress to that effect. *3 Story's Laws, p. 1984, 1987, sec. 5.* That the seizure and detention of the boat, by the sheriff, must necessarily obstruct and retard the passage of the mail, is self evident, it being the very vehicle appropriated to its conveyance. It is, moreover, admitted that the mail was put on board the 5th February, immediately after the seizure, and was there on the sixth, when the argument to set aside the order was had. So that the passage of the mail was obstructed and retarded twenty-four hours, in virtue of the seizure.

A creditor has not a right to enforce his private claim, to the prejudice of the public interest; and though he disclaim any right to seize and stop the mail itself, yet the effect is the same, if he seize and stop the vehicle in which it is conveyed;

EASTERN DIS. the passage of the mail is thereby obstructed, and this is
February, 1834. what the law prohibits.

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PORTER ET AL. The case of the United States against Barney, contains a full illustration of this subject, and establishes the very point for which we contend. 3 *Hall's Law Journal*, p. 128. *Sergeant's Con. Law*, p. 127, 8.

The power over the post office department, is an attribute of sovereignty in all countries, and especially secured by the constitution of the United States. It is the appropriate means by which the government exercises many of its vital functions, and conveys all its orders throughout every department, civil and military, and without which the whole machinery would be brought to a pause. Its establishment would be vain and nugatory, if its great purposes could be defeated by process issuing from a state tribunal. See 3d vol. *Story's Com. on Con.* p. 22, for many excellent reflections upon this point.

The states of Maryland and Ohio, attempted to prevent the establishment of branches of the United States Bank, within their respective territories, by indirect means, the taxation of their property and operations. The causes having been taken before the Supreme Court of the United States, that tribunal determined that the states have no power by taxation or otherwise, to retard, impede, burthen, or in any manner control the operations of the constitutional laws, enacted by congress, to carry into effect, the powers vested in the national government. *McCulloch vs. State of Maryland.* Condensed Rep. Sup. Court, vol. ps. 479, 80, 2, 5, 6, 7, 8, 9, and notes ad finem. The terms of the prohibitory law are so broad, that they make no exception, and protect alike from seizure, a stage, carriage, horse, steam boat, or other vehicle, belonging to the mail carrier, or to the government.

Since the case of the *United States vs. Barney*, before cited, no attempt is known to have been made to seize the private property of the mail carriers for debt, notwithstanding the innumerable contracts they must have made with the post office department throughout the Union, for the last twenty-seven years, since the date of that decision. A

plain proof that the law is settled and understood as contemplated for. Nor is this any hardship; for every one is presumed to know such to be the law: just as the creditor ought to know he cannot arrest the person of a private soldier whom he trusts; or the property or person of a married woman, in certain cases; the property of the government, the salaries of its officers, or the property which the law permits the bankrupt to retain for the support of his family.

By law a certain time is allowed to mail carriers to stop at the various post offices for opening the bags, examining and distributing the mails, and for receiving others in turn, (*Story's Laws*, vol. 3, p. 1988, sec. 11,) for this purpose there are allowed by regulations, sometimes twenty minutes, sometimes thirty, and at the great distributing post offices, it can never exceed one hour, the driver generally conducts his stage to the door of the post office, where he takes out the bags, delivers them to the post master, and receives them again at the appointed time, he then drives forward the same stage, stopping in like manner at the numerous offices on the road, where he is bound by contract to deliver the mail. The bags are necessarily taken out many times every day. If the stage, or a horse, could be seized at that moment, by a creditor, it is quite plain, that the mail would be obstructed and hindered in its passage, so as utterly to defeat the purpose of the law.

Thus the mail arriving at the rail road, at lake Pontchartrain, must be taken out of the boat to be brought to the city. If the boat could be seized at that moment, then would the mail be as effectually obstructed and hindered in its passage, as if it had been on board, and was by that very means retarded twenty-four hours, as is admitted in the statement of facts; it will not be forgotten that a law of Congress authorises the transportation of mails by steam boats, from New-Orleans to Mobile, so that if it were unlawful to seize and stop a horse, or a stage, if the mail happened not to be in it, it would be equally so to seize a steam boat appropriated by special contract to its transportation. *Story's Laws*, vol. 9 and p. 1843, sec. 5.

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As a further illustration of this subject, I would advert to that section of the law which exempts post masters or post riders from doing militia duty, or serving on juries. 3d vol. *Story's Laws*, p. 1996, sec. 35.

BULLARD, J., delivered the opinion of the court.

The statement of facts in this case, shows that the plaintiff, a creditor of the defendants, who are non-residents, procured from the court of the first district, an attachment which was levied on the steam boats Long Branch and Watchman, belonging to the defendants, which are now, and have been for some time past, employed in transporting the mail between Mobile and New-Orleans, under a contract with the Post Master General, by which it was agreed that the mail should be conveyed in steam boats. The mail bags were put on board the Watchman for transportation, shortly after the seizure, and were on board when the rule to show cause why the boats should not be released, was argued. The judge *a quo*, ordered the release without security, and the plaintiff appealed.

It is conceded, that by the law of this state, the steam boats in question are liable to be seized, but it is contended by the appellees, that the state law conflicts with acts of Congress, providing for the establishment of post offices and post routes, and for the regular transmission of the mail, and must yield to the paramount authority of an act of Congress.

The Post Master General is authorised by law, to cause a mail to be transmitted by water, from the city of Mobile to the city of New-Orleans. Vol. 3, *Laws of U. S.* p. 1984. (*Story's edition*.)

He is further authorised to have the mail conveyed in any steam boat, or other vessel, used as a packet in any of the waters of the United States, provided he does not pay more than three cents on each letter, and not more than one half cent for each newspaper. *Ibid.* 1987.

But the provision of law, particularly relied on by the appellees, is contained in the 9th section of the article above recited, which is in the following words. "That if any person shall knowingly and wilfully obstruct, or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage, carrying the same, he shall upon conviction for every such offence, pay a fine not exceeding one hundred dollars."

These are believed to be the only existing enactments of Congress on the subject. The question therefore is, whether the seizure made by the sheriff, was a violation of this statute and tortious. If so, the party can gain no advantage by it, and the court below was correct, in ordering the release. The arguments of counsel, as well as the statement of facts, present the question in a broader light, to wit: Whether the court is to infer from this act of Congress, upon fair principles of construction, that Congress intended to exempt from seizure, under process issued from state courts, any vehicle or vessel, usually employed in the transportation of the mail, in pursuance of contracts with the post office department, at a time when the mail is not on board, and the vehicle, or vessel, is not "*on its passage carrying the same.*"

That Congress has authority under the constitution to use all proper and necessary means to secure the regular transmission of the mail, admits of no doubt. But we are to inquire not what the authority of Congress is, but how far have they chosen to exercise it. The above recited act is of a penal character, and in its application to individuals, charged with a violation of it, must be strictly construed; and certainly not with less strictness, when it is sought under its provisions to protect from the pursuit of creditors, the vessels usually employed in the transportation of the mails, in derogation of a right recognised by the laws of the state, in according to the general rules of construction, it would seem necessary, in order to convict under this section, and aver and prove, substantially, in the words of the act, that the traverser, knowingly and wilfully obstructed or retarded the passage of the mail, of the drivers, or of the carrier, or of any

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The clause of the act of congress, relating to the obstruction of the passage of the mail, is of a penal character, and in its application to individuals charged with a violation of it, must be strictly construed; and certainly not with less strictness when it is sought under its provisions, to protect from the pursuit of creditors, the vessels usually employed in the transportation of the mail, in derogation of a right, recognised by the laws of the state.

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It is not enough that in consequence of the seizure, the mail contractor was put to inconvenience, in complying with his contract, and that there ensued a delay in the departure of the mail, the seizure itself must be a wilful obstruction.

horse or carriage carrying the same. Could the sheriff, who made this seizure on the plaintiff, as accessory, be convicted under this statute? Might he not justify himself by showing his process, and that the boat at the time was lying in port and the mail not on board. It is not enough that in consequence of the seizure, the contractor was put to inconvenience in complying with his contract, and that there ensued a delay in the departure of the mail; the seizure itself must be a wilful obstruction.

It has been decided, under a similar statute, by the Federal Courts, that there may be cases in which the mail stage, actually in motion, with the mail on board, might be stopped without incurring the penalty. In the case of the *United States vs. Hart*, tried in the Circuit Court, before Judges Washington and Peters, the defendant, a police officer of the city of Philadelphia, was indicted for wilfully obstructing the passage of the mail stage through the streets of the city. The officer defended himself on the ground that the driver was at the time driving at such a rate as to endanger the lives of the citizens, contrary to an ordinance of the city. The court ruled, that if the ordinance conflicted with the act of Congress, it must yield; but that the driver was committing a breach of the peace, independently of the ordinance, and the officer was justified. They went on to say, that if the driver of a mail stage should commit a felony in the street, and then throw himself into his box, or if a felon should place himself in the stage, an officer would be justified in stopping the stage to arrest them, although the consequence might be to retard the passage of the mail. 1 *Peters* 390. *Sergeant on Con. Law*, 327.

The case of the *United States vs. Barney*, in the District Court, for the district of Maryland, has been relied on. In that case it appears that the defendant was an innkeeper on the road at the Susquehanna river. He attempted to justify the obstruction, by showing that he had a lien on the stage horses for food furnished them, for some time before their arrest and detention. It does not appear that he had any process, but had refused to let the driver have the horses,

until the bill for feeding them was paid. Judge Winchester, before whom the trial was had, says that two questions were made:

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"First. Whether the right of an innkeeper to detain a horse for his food, extends to horses owned by individuals, and employed in the transportation of the mail? and

"Second. Whether such right extends to horses belonging to the United States, and employed in the same service?"

On the first question, he decided that the innkeeper had no lien, because it was evident that some other security was looked to and relied on. But he seems to make the case turn on the question of lien or no lien. Among other arguments to show that there was no lien, the judge says: "a carrier of the mail is bound not to delay its delivery, under severe penalties, and it can scarcely be supposed that he would expose himself to the penalty of such delay, by leaving his horses subject to the arrest of every innkeeper on the road for their food."

The second question raised in that case, has nothing to do with this, as it is not pretended, that the boats are the property of the United States. But the judge goes on *arguendo* to state cases not excepted by the statute, he says "a stolen horse found in the mail stage, the owner cannot seize him." Perhaps not, because it would not be a peaceable taking, if the driver should oppose him, but if he should find his horse which had been stolen, in the stable of the contractor, at one of the *termini* of the mail route, the peaceable taking of the horse would not, in our opinion, be a violation of the act of Congress. "The driver's being in debt," says the judge, "or even committing an offence, can only be arrested in such way as does not obstruct the passage of the mail." In this last case supposed, the judge carries the doctrine much further than judge Washington did in the case above recited. It is not easy to perceive, how a mail carrier arrived at the end of his route, and after delivering his mail, could be protected from arrest for debt, under the provisions of this act of Congress. *Hall's Law Journal*, vol 3, p. 127.

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Congress has provided against the wilful and tortious obstruction of the transmission of the mail, but contractors warrant against ordinary delays in its departure and arrival arising from their own fault or want of means, by subjecting themselves to penalties or forfeitures. It would appear to us not a good defence to a suit on the contractor's bond, who was bound to convey the mail by steam boats generally, that a particular steam boat usually employed by him for that purpose, had been seized in port by the sheriff, while the mail was not on board, at the suit of his creditors, although a delay in despatching the mail may have been the consequence.

The court is, therefore, constrained to say, that in their opinion, the act of Congress does not extend to this case, that the seizure was not tortious, and ought to be reinstated.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, that the cause be remanded to be proceeded in according to law, and that the appellees pay the costs of the appeal.

SPURRIER vs. SHELDON ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where defendant was obligated to deliver certain articles to the plaintiff, and the latter in his letter requested the former to hasten the shipment of the articles, and this letter was on the trial produced by the defendant, held that the latter was thereby put in default.

This was an action brought by plaintiff, a painter and glazier in the town of Louisville, Kentucky, against defendants for breach of an alleged contract to furnish plaintiff

with a large quantity of spirits of turpentine, whiting and paint. EASTERN DIS.
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The defendants allege that they made only a conditional contract, viz: to furnish the articles if they could procure them.

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The foundation of plaintiff's claim is a bill of parcels, in which it is stated that plaintiff had bought of defendants various articles which were delivered to him.

The bill adds, under the title of articles to be sent, twenty barrels of spirits of turpentine, at forty cents; four thousand pounds Spanish whiting, one and a fourth cents; one cask Venetian red, six cents: probable amount, three hundred and fifty-one dollars.

In a recapitulation, this sum is charged to plaintiff, and a balance struck against him of one hundred and twenty-six dollars and seventy-six cents. This bill is dated January, 1828.

Plaintiff proved that he was at that time, (1828) the only painter and glazier in Louisville, and made large profits upon the re-sale of these articles; that the quantity, particularly of turpentine, was very large, and was to be his principal supply for the summer.

That he could not supply his customers, and lost the profits.

The defendants allege that it was not a positive contract, but that they expected to receive the articles in their annual supply of goods, and if so, they were to furnish them. That the expression in the bill of parcels, of articles to be sent and probable amount of costs, establish this construction of the contract.

There are various letters between the parties in evidence; the plaintiff claims a cash balance of two hundred and sixteen dollars, and defendants admit one of one hundred and twenty-five dollars, which has been tendered.

The case was submitted to a jury, who found a verdict of five hundred dollars for plaintiff.

There was a motion for a new trial, on the grounds, that

1. There was no evidence of any contract by which defendants bound themselves to furnish the articles.

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2. That the contract was only conditional, and it was through no fault of defendants, which prevented their sending the articles.

3. That no damages can be claimed, there being no evidence of defendants being in default.

4. Inasmuch as the contents of the letters of defendant, introduced in evidence, and charged to be taken as true, unless rebutted, were entirely overlooked.

The motion was overruled, and the defendants appealed.

MARTIN, J., delivered the opinion of the court.

The defendants in this case resisted the plaintiff's claim for damages, on the breach of a contract to furnish a supply of spirits of turpentine, whiting and paint, on a suggestion that the contract they entered into was not an absolute or positive one to deliver these articles, but to ship them if they could be procured; that they used, unsuccessfully, their utmost efforts to procure them; lastly, that they never were legally put *in morâ*. There was a verdict and judgment against them, and they made a vain attempt to obtain a new trial and appealed.

In this court the plaintiff's counsel has urged, that the verdict and the opinion of the district judge in refusing the new trial, legally made to the two first suggestions of the defendants, and an examination of the evidence, has induced the opinion, that it is not our duty to disturb the verdict.

Where defendant was obligated to deliver certain articles to the plaintiff, and the latter in his letter requested the former to hasten the shipment of the articles, and this letter was on the trial produced by the defendant, held that the defendant was thereby put in default.

Letters of the plaintiff's to the defendants, (introduced by the latter) to hasten the shipment of the articles, establishes the demand in writing, required by the *Louisiana Code*, 1905, to put the party *in morâ*.

The defendants have complained the damages awarded by the jury were excessive. This objection was presented among others, to the inferior judge, on the motion for a new trial, and we do not think he erred in disregarding it.

It is therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

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Schmidt and Sterrett, for defendants and appellants.

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Benjamin, contra.

SORBE ET AL. vs. MERCHANT'S INSURANCE COMPANY.

APPEAL FROM THE PARISH COURT OF THE PARISH AND CITY OF NEW-ORLEANS.

To *ship goods at a place*, means to put them on board of a vessel at the place designated, but to *ship goods from a place* does not necessarily imply that they should be laden at the place from which they are to be shipped. The word *ship* may signify either the putting on board of a vessel, or the carrying merchandise on a voyage between two *termini*.

In case of doubt the contract should be construed strictly against the person contracting.

In a policy of insurance of certain merchandise *to be shipped from* a given place within a specified period, the material circumstance which ought to weigh most is the time of the sailing of the vessel on which the property is laden; and this could take place so as to bind the insurer at any time within the specified period.

The plaintiffs aver in their petition, "that on or about the 25th February, 1831, they contracted with the Merchants' Insurance Company of New-Orleans, for the assurance of merchandise by any good American or French vessels, to be shipped from Havre and any port of France south of it to New-Orleans, during six months from and after the first day of August, 1831, and to be consigned to them, in consideration whereof, they paid the said company the sum of six hundred dollars, being at and after the rate of one and

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a half per cent. in forty thousand dollars. They allege there is error in the policy, it differing from the terms of the original application and acceptance, which are in possession of defendants. They show that under the policy, there was shipped to them from the port of Bordeaux, by the French ship Trinity, of which Betters was master, goods and merchandise to the amount of seventy-four thousand four hundred and ninety-two francs and thirteen centimes, equal with the addition of fifteen per cent to the sum of seventeen thousand one hundred and thirty-three dollars. The vessel sailed from Bordeaux on or about the 10th day of August, 1831, and was wrecked on the coast of Louisiana. The merchandise was wholly lost by risks within the policy, viz. by the perils of the seas, of which the said company had notice, abandonment was tendered, and payment demanded after the necessary proof exhibited to them.

The Merchant's Insurance Company denied that the plaintiffs had any claim upon them under any policy signed by the proper officers of the company. They denied all the allegations of the petition.

The policy stated that P. E. and O. Sorbé, "On account of whom it may concern, do make insurance, and cause whom it may concern to be insured, lost or not lost, at and from Havre and any port or ports of France south of it to New Orleans, upon all kinds of lawful goods and merchandise, laden or to be laden on board of good French and American vessel or vessels or either, whereof is master for the present voyage M. or whoever else shall go for master in this said vessel, or by what other name or names the said vessel or the master thereof is or shall be named or called: beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof on board of the said vessel at as aforesaid, and so shall continue and endure until the said goods and merchandise shall be safely landed at New-Orleans aforesaid. And it shall and may be lawful for the said vessel in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance."

The insurance was declared to be on "wine, brandy, sweet oil and other merchandise, as interest may appear, with fifteen per cent. on the invoice: to be shipped, to the assured during six months from and after the 1st day of August, 1831: loss, if any, payable to P. E. & O. Sorbé. Averaged loss recoverable on each package of dry goods."

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John Betters testified that he was master of the French ship *Trinity* on her late voyage from Bordeaux to New-Orleans. She was chartered for two hundred and fifty tons, to the house of Sorbé; conditioned to sail on the 5th August. In fact, the house of Sorbé put on board about three hundred tons; there were some goods on board belonging to other persons. They commenced loading the cargo consisting of wine, brandy, vinegar, some hardware, &c. about the 10th of July, and continued to receive them from the house of Sorbé up to the 6th August. On that day they left their place of mooring, and dropped down to Baccalan, a kind of suburb to Bordeaux. A lighter was afterwards sent to the ship loaded with boxes of wine belonging to the house of Sorbé, the whole of which could not be taken on board; a part, about two hundred boxes were received and the others were returned to the city.

Witness on the 10th of August joined the ship at Pauliar, about eleven leagues below Bordeaux. They put to sea on the 12th, about three o'clock in the afternoon.

To the best of his recollection, he signed his bills of lading between the 6th and 9th of August; he is well satisfied that it was during this time, though he cannot state the exact day, and he is sure he did not sign his bills before the goods were received on board.

They pursued their voyage without any thing unusual until the 4th October, when during a thick fog the ship struck. They were then out of sight of land, as they found when the fog cleared off. They struck about 9 o'clock in the morning; about four in the afternoon the ship bilged; about sun set they dispatched their boat for assistance, and the passengers and crew, fifty-three in number, mounted into the tops to prevent the sea breaking over them during

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the night. About forty-eight hours after the ship struck, the boat not returning, they made a raft and left the ship. Twenty-four hours after, they landed at a place near Cheniere and Tigre, where the boat joined them with assistance about twelve o'clock the following night. They saved nothing from the wreck. Books, papers, clothing, &c. all were lost, the ship having sunk suddenly and unexpectedly.

The Trinity had been built about two years, and completely sound. It was the opinion of witness, that the ship was carried out of her course by the force of currents, and by reason of the weather having been for several days preceding, rainy or cloudy, so that they could not take their observations.

The testimony of the captain was corroborated by that of Peter Calvaizac the mate.

The cause was submitted to a jury, who returned a verdict for the plaintiff, from which after an unsuccessful attempt at a new trial, the defendants appealed.

Slidell, for defendants and appellants, made the following points.

1. All the difficulty in this case has arisen from the false view taken of it by the plaintiffs. The time of shipment is not a matter of representation or even of warranty; it is the condition on which the policy attached. All goods shipped or laden, which are equivalent terms, at any time from the 1st August to 1st February, were covered by the policy to the extent of forty thousand dollars; none shipped or laden before or after those dates was covered; the time of sailing was immaterial, unless indeed a delay altogether unreasonable and unaccounted for should elapse from shipment to time of sailing.

2. The stating shipment from and after the 1st August, was clearly not a representation, if it be considered as a warranty, it must be strictly complied with to the very letter. See *Phillips on Insurance*, p. 125, 127, 128. *Hughes do.* 233, 246, 247. *Wilson vs. Schroder.* *Moody and Wilkins's Reports* for 1829, p. 317.

3. In a policy, the clauses fixing the *termini* of a voyage, which in time policies are the day and hour when the insurance commences, and when it terminates, are construed most strictly. See *Manly vs. United Marine and Fire Insurance Company*. 9 *Massachusetts Reports*, 87. *Payne vs. Hutchinson*, 2 *Taunton*, 405. *Castillo vs. Noble*, 2 *do.* 403. *Phillips on Insurance*, p. 163, 164. *Hughes do.* p. 136, 140. *Murray vs. Columbian Insurance Company*. 4 *Johns. Rep.* 448.

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4. If the policy had been in the usual form on goods by the Trinity from Bordeaux, it would have attached from the moment of the goods being put on board of the ship, or of the lighters, if such were the custom of the port. See *Phillips on Insurance*, p. 166. *Code of Commerce*, art. 328, and 341; and this is also the express condition of the policy, to commence from the loading, shipping, landing, are synonymous terms.

5. The plaintiffs themselves produce as part of their preliminary proof, a bill of lading, in which the goods are acknowledged to be "shipped" in good order and well conditioned dated 30th July. That they have always been so considered by the courts see *Murray vs. Columbian Insurance Company*. 11 *Johns* 306. *Howard vs. Kettle*. 16 *East. Rep.* 189. See also *Webster* and *Johnson's Dictionaries*. Such also is the popular and general meaning of the verb *ship*.

6. The risk never having attached, the plaintiffs could have claimed a return of premium for all goods loaded before the 1st August, and their claims could not have been resisted by the defendants. *Phillips on Insurance*, p. 513.

7. The judge erred in charging the jury, that the contract was to be construed strictly against the defendants. The plaintiffs are the parties stipulating, the defendants those who contracted the obligation, and if the intention is doubtful, the latter are entitled to the benefit of the doubt. *Civil Code*, art. 1952. *Phillips on Insurance*, p. 14. *Pardessus*, 3 vol. p. 269, No. 777. *Le Nouveau Valin*, p. 354, where a number of authorities are cited.

Strawbridge, contra.

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MATHEWS, J., delivered the opinion of the court.

This is an action on an open policy of insurance, in which the plaintiffs claim the value of certain goods shipped to them, from Bordeaux in France, to New-Orleans, in pursuance of their contract of assurance, and which goods were lost on the voyage, &c. They obtained judgment in the court below, from which the defendants appealed.

The assurance was effected on goods of a certain description, to the amount of forty thousand dollars, to be shipped from Havre or any port of France, south of it during six months from and after the first day of August, 1832, in any French or American vessel or vessels, &c. The goods for the loss of which reparation is claimed in the present suit, were laden on board a French vessel called the Trinity, which sailed from Bordeaux about the 6th of August. There is no dispute as to many of the important facts of the case, viz: the sailing of the vessel, the value of the goods shipped for account of the plaintiffs, and their loss by a risk insured against.

We find on the record a bill of exceptions to the opinion of the judge *a quo*, expressed to the jury which tried the cause. In his charge he stated, that in his opinion, the word shipped did not mean *as used in the policy*, the putting on board or lading, but the despatching of goods and that in case of doubt the contract was to be construed strictly against the person contracting.

It is a matter of doubt from the evidence at what time the property in question, was put on board the vessel; whether on the 30th of July, 1832, the date of the bill of lading, or after the first of August, before which time the captain testifies that he did not sign any bill of lading.

On the part of the defendants, it is contended that the contract of insurance never took effect, in consequence of an implied warranty by the insured, that the goods should not be shipped or put on board the vessel, before the first of August. A philological contest is raised as to the mean-

ing of the word to ship or shipped. To ship goods at a place, means to put them on board of a vessel at the place designated; but the expression to ship goods from a place, does not necessarily imply that they should be laden at the place from where they are to be shipped or carried, they have been put on board at some other place, and shipped from one different. It appears to us, that the word to ship as used in the transportation of merchandise, from one place to another, may signify whether the putting on board of a vessel or ship, or the carrying of such merchandise on a voyage between two *termini*. We are, therefore, of opinion that the judge below did not err in his charge to the jury, respecting the meaning of the word shipped as used in the present policy. Neither do we believe he erred, in relation to the opinion expressed as to the mode of interpreting the contract. The word stipulation was used by *Roman* jurists, to express all kinds of contracts, except such as had a particular denomination; it was done by question on answer; the obligation was imposed on himself by the person who answered. In the jurisprudence of France, from which our Civil Code is borrowed, the word stipulation means any engagement or condition, introduced in a contract, &c. See *Merlin, Répertoire, Verbo, stipulation*.

The contract was made to insure goods to be shipped from Havre, or any port south of it in France, and to be consigned to the insured, during a period of six months to commence from the first of August, 1832. This policy stipulates for time and for places where the goods are to be carried. According to a fair construction of the contract the material circumstance which ought to accept most, is the time of the sailing of the vessel on which the property ought to be laden, and this could have taken place so as to bind the insurers at any period, whether six months from the first of August, 1832. And as in our opinion the contract did not take effect, until after the first day of the period stipulated; the circumstance of the goods having been put on board a day or two before, admitting it to be true, ought not to have such weight, as to annul the contract or pre-

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In case of doubt the contract is to be construed strictly against the person contracting.

In a policy of insurance of certain merchandise from a given place, to be shipped within a specified period, the material circumstance which ought to weigh most, is the time of the sailing of the vessel on which the property is laden; and this could take place so as to bind the insurer at any time within the specific period.

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vent it from producing any effect. Any damage which the merchandise might have sustained previous to the first of August, would not have been embraced by the policy, and the probability of any such damage occurring in so short a period of two days is so remote; unless by some violent convulsion of nature, easily susceptible of proof; that it ought not to be taken into consideration in the discussion of the cause. This case differs from those cited by the counsel for the appellants, when goods were put on board at places different from those stipulated in the policy. In the present instance the policy would have protected goods shipped from any of the ports designated during six months, from the first of August, 1832. To show that the essential and substantial part of the contract, relates to the time of the vessel sailing from the port *a quo*, and not the time of lading; let it be supposed that merchandise had been put on board in January, 1833, which would be within the limitation of the six months, and the ship had not sailed until some time in February, it certainly could not be pretended that the underwriters would have been responsible for any loss happening in such a voyage.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

Slidell, for appellants, applied for re-hearing.

The defendants in this case respectfully ask for a re-hearing, and that the judgment of Parish Court may be amended, by disallowing interest on the sum recovered from the day of the verdict, no interest having been allowed by the jury, nothing can be added to the verdict of a jury, and no interest either before or after judgment can be given on an unliquidated demand. This question has been settled by repeated decisions of the court, among the number I refer the court to *Orleans vs. Denis*. 7 N. S. 225. *Blair vs. Kelso*. 7 N. S. 263. *Trimble vs. Moore*, 2 L. R. 577. *Passas vs. Mendibrown*. 4 L. R. 129.

Strawbridge, contra.

1. By the eighth rule of practice in this court, parties are obliged to file with the clerk a note of their points, and authorities and "*no re-hearing can be granted on any point which is neglected to be furnished in compliance with this rule.*"

2. Interest is fairly due from the the time the sum was liquidated, and a slight error on one side is as much entitled to protection as in the other, the rule is positive and the re-hearing must be refused.

The motion for a re-hearing was overruled.

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vs.
BLANDIN.

ZACHARIE vs. BLANDIN.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a partnership, as to a single transaction, exists between two commercial firms, in an action by one firm for a settlement as to that transaction, it is not necessary to make all the members of the other firm defendants; especially where some of them do not reside within the jurisdiction of the court.

In such a copartnership the actual amount only which one of the firms may have paid on the merchandise owned in partnership, for duties in a foreign port, will be allowed to the firm paying it; and the court will not inquire whether that amount was expended in bribing the custom house officers of the port where the duties were paid.

Where the consignee paid the duties in depreciated government paper, on the consignment on joint account, solely at his own risk, and not at the instance and request of the consignor; held that the consignor was entitled to an equal share of the gain, by that mode of payment.

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The signing of an account by one of the parties acknowledging its correctness, is not conclusive against a correction of gross errors in fact or mistakes, as to the legal rights of the parties.

This action was brought by James W. Zacharie, as surviving partner of J. W. Zacharie and David Patterson, trading in New-Orleans under the firm of J. W. Zacharie & Co. It was alleged that the defendant, Manuel Blandin, of Tampico, in the Republic of Mexico, was, in April, 1829, a member of the firm of Harrison, Brown & Co., of Tampico, of which firm one member, Thomas Harrison, has since died, and the other member, George J. Brown, was at the institution of the suit in England.

On the 16th of April, 1829, the firm of J. W. Zacharie & Co., shipped to Harrison, Brown & Co., on joint account, a quantity of merchandise, amounting, as per invoice, to thirteen thousand three hundred and twenty-seven dollars. The consignees sold the merchandise, and the gross proceeds amounted to upwards of fifty-five thousand dollars. The petition charges that the consignees remitted to the shippers the sum of eight thousand four hundred and seventy-nine dollars, less the export charges, and that there should have been remitted the further sum of six thousand dollars.

The petition alleges that this difference arose from the consignees having overcharged the amount of duties, and from having charged them at their full value, when, in truth, they were paid in a depreciated currency, the benefit of which the said consignees retained to themselves; from overcharging commissions, storage, packing, transportation to the interior and expences of remitting the money, which charges, it is alleged, were incorrect, illegal and contrary to their agreement, which was to share the whole profit of the adventure.

The shipment consisted of one hundred and sixty-three bales of domestics. The statement at the beginning of the invoice is in the following words: "Invoice of domestics, shipped by J. W. Zacharie & Co., on board schooner

Correo, Tucker, master, for Tampico, for joint account and risk of the shippers and Messrs. Brown, Harrison & Co., of said place, and to them consigned."

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A curator *ad hoc* was appointed. He excepted to his appointment as illegal, the case not being one in which the appointment could be made.

The attorney for the defendant appeared and excepted that due and legal service of the petition and citation had never been made on the defendant, and that the plaintiff had no right to institute the suit as survivor, and in the manner and form in which it had been instituted.

Hugh G. Barclay, one of the heirs, and curator of the absent heirs of David Patterson, deceased, filed his petition of intervention, and was admitted a co-plaintiff in the action.

The judge *a quo* sustained the exceptions of the defendant's attorney and dismissed the action. On appeal, the Supreme Court reversed this decision, and remanded the cause for further proceedings. *Vide 4 La. Rep. 154.*

The defendant then filed his answer. He denied the right of the parties respectively to sue him in the manner and form pursued, or that the said Barclay was heir and curator, as alleged.

He averred that the interest of J. W. Zacharie & Co., had been duly accounted for to them, and that the whole matter in relation to the assignment, had been finally closed and adjusted between the two firms. That on the settlement, an account current of sales was exhibited, and was acknowledged by J. W. Zacharie & Co., by David Patterson, one of the firm, duly authorised. He added the general denial.

In his supplemental answer he alleged that in the account of sales rendered, the sales were considered as having all been made for cash, on the supposition that the proceeds of the sales on credit would be duly realised; that there remained several debts of the concern still outstanding, and that many of the debtors, though in good standing when the sales to them were made, had since become insolvent. He

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prayed that the plaintiff might refund his portion of the lost debts.

Upon these pleadings, the parties went to trial.

Bosque, for the plaintiff, testified, that in 1829 and 1830, part of the duties on goods imported into Mexico, were allowed to be paid in government paper, (*libranzas*.) taken at par. Previous to March, 1830, the value of that paper had ranged from fifteen to thirty per cent. discount. There was risk in receiving that paper.

Dufart, for the plaintiff, testified, that in 1829, one half of the duties were payable in that paper at par, which could then have been purchased at a discount of forty per cent. There was then a great risk in buying *libranzas*, owing to the unsettled state of the government, arising from the then expected Spanish expedition directed against Tampico. The government would at times receive the *libranzas* in pay for duties, but at other times they were refused.

Lizardi, for the defendant, testified, that the charges on shipping specie in Mexico, are, in the interior, two per cent. discount, for Mexican dollars; from one to two per cent. for escort carriage; from one half to one per cent. commission for shipping, and three and a half per cent. export duty. The charges for sales of goods in the interior are two and a half per cent. commissions for sales, and two and a half per cent. guarantee. No commission is charged for sending the money to the coast. The commission in sea ports is five per cent., and one per cent. storage. If sales of goods are made in the interior payable in the usual currency, a discount of one and a half per cent. is paid for good money.

Cucullu, testified, that generally the proceeds of sales of goods sold in Mexico, are not remitted till long after the credit on which they are sold. Seven and a half per cent. commissions on the gross sales are usually paid on goods sent to and sold in the interior of Mexico, including the commissions at the sea port and those of the interior.

La Rue, who was a clerk of Harrison, Brown & Co. in

1829, testified, that the domestics composing the consignment, were forwarded to and sold at San Luis, Aguas Calientes and Zacatecas, and sold during the summer 1829; that some of the sales were for cash, and others on a credit; that the rates of the charges were according to the usage and custom of Mexico. He stated that in May, 1830, he handed a copy of the account current to Patterson, who verbally approved of it, acknowledged its correctness, and expressed his satisfaction as to the remittance of the balance. Patterson delivered to witness no written authority from the plaintiff, but after Patterson had left Tampico, a letter was found of plaintiff to the defendant's firm, authorising Patterson to effect a final settlement as to that shipment.

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The plaintiff had judgment for three thousand four hundred and eighty-five dollars.

The defendant appealed.

Hennen, for defendand and appellant, contended that,

1. The transaction between the parties was for a single adventure. J. W. Zacharie & Co., shipped to Harrison, Brown & Co., a quantity of goods *to be sold on joint account*, the profits to be shared in equal proportions. The present suit is instituted by J. W. Zacharie & Co., one of the co-partners, against M. Blandin, one of the firm of Harrison, Brown & Co., who were to share one half of the profits, to rectify the errors and overcharges in an account of sales rendered; to compel him to pay over a sum which they aver is due on the settlement of the co-partnership. *It is therefore a suit between one set of partners, against those of another set.* If to liquidate the whole transaction, it has been improperly brought; because all the partners have not been joined in the action and made defendants. 1 *Peters' Washington's C. Court Reports*, 435, *Lamulivos' case*. 3 *N. S.* 476, *Faurie vs. Millaudon*. *Civil Code*, arts. 2080, 2081. 2 *Durnford and East*, 282, *Graham vs. Robertson*. If to settle a particular part of the partnership business, it is equally wrong, for no action can be maintained for such

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purpose. 10 *Martin*, 433; *Drumgool vs. Gardner's heirs*. 11 *Martin*, 427. *Gow on Co-partnership*, 88. (Ed. 1830.)

2. Should the action be considered as properly brought, and as maintainable in its present form, the defendant, M. Blandin, is liable only for his single share, *i. e.* one third, as one of the three co-partners, to the other two co-partners. One co-partner not being liable to another co-partner, for the portion of the debt of the other co-partners; *solidarity* does not exist here.

3. What is the extent of liability, if any, of the defendant towards the plaintiff? 1. According to the evidence of the plaintiff, the debts were all outstanding, nearly; nothing is due to the plaintiffs, according to the evidence of themselves. 2. According to that of the defendants, the same result must be obtained.

4. To descend to particulars of the accounts. The first and greatest item, is that of the duties charged. The co-partnership was a special one, and the partners acted as factors, with respect to each other. 4 *John's Rep.* 266; *Livingston vs. Rosevelt*. Factors, in consideration of the responsibility which they run, are entitled to have the benefit of foreign customs, the payment of which they have evaded. 3 *Salkeld*, 235. 1 *Equity Cases*, abridged, 369.

5. But the amount allowed by the judge below, twenty-five per cent., is erroneous, and is not supported by the evidence.

6. There are errors in the calculation of the accounts, made by the judge below.

7. Interest should be allowed to the co-partners, who advanced the largest amount of funds, to wit: for the payment of duties.

8. But the accounts of Harrison, Brown & Co. are examined by Patterson, authorised for that purpose, and approved, being found correct. This acknowledgment cannot be revoked, it is binding on the plaintiff, particularly, after all the discussion which had taken place between the parties about the accounts, as appears from the correspondence.

9. Interest allowed by the judgment is erroneous, because the claim of plaintiffs was unliquidated. *Code Practice, arts. 553, 554.*

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Strawbridge and Slidell, for plaintiffs and appellees, contended that:

1. The purchase and shipment by the plaintiffs of the goods, and their acceptance by the house of defendants in Tampico, constituted a contract, partaking of the nature of partnership and of mandate, not perhaps strictly reducible to either. It is a joint adventure, known to the French law as a "*société en participation*." 4 *Pardessus*, 141.

2. Whether it be a contract of partnership or of mandate, or partake of both, the obligations of the defendant are the same; they both require the most perfect good faith, and the defendant is bound to account to the plaintiffs for a moiety of all the profits and advantages resulting from the adventure, or which he might, with ordinary diligence, have secured. *Domat*, Title 8 sec. 4. *Pothier, Traité de la Société, chap. 7, Nos. 121, 122, 124.* *Civil Code, art. 2830, 2833.* *Pothier, Traité de Contract de Mandat, Nos. 46, 47.* *Civil Code, arts. 2971, 2972, 2973, 2974.*

3. Blandin was properly sued alone, being responsible *in solido* for the debts of his house. If he wished his co-partners joined, he should have pleaded in abatement; he cannot now avail himself of an exception not made in the inferior court. *Code Practice, art. 333.* *Roberts vs. Shepherd*, 4 *La. Reports*, 91. *Kempe's heirs vs. Hart*, 4 *La. Reports*, 482. *Nicolet vs. Breedlove*, 7 *Peters' Reports*.

4. Where the contract of partnership does not determine the shares of profit, each partner is entitled to an equal share. If, then, the contract were of the character the defendant pretends, the division would have been, *per capita* amongst all the partners; but they themselves have divided between the two firms, each one half. *C. C. 2836.*

5. The case of *Wetmore & Co. vs. Baker & Swan*, was

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undertaking to run a line of stages, by two different firms. It was held that though Wetmore & Co. were partners, and also Baker & Swan, yet there was no partnership between the whole. That the act of one of each of the two partners bound his firm. 9 Johns. 309. See also *Post vs. Rimerly*. *Idem*, 471. In 1 *Montague, on Partnership*, it is held in various cases, (see note 111 at page 61, of the notes) that where several persons are partners in trade, and some of them carry on a distant trade, and in such character deal with and become creditors of the other firm, under a joint commission of bankruptcy, proof may be made of their debt as if they had dealt with strangers. *Gow*, 307, 308.

6. The distinction of minor partnerships, 1 *Mont*. 219, compound partnerships, *Idem*, 178, inferior partnerships, *Gow*, 307, 308, 319, is well known to the common law. Their acts may render them all liable to third persons as partners; but as between themselves, the firms are as though they were strangers; a partner cannot prove against a firm, but the minor partnership may. *Cow*, 319. The same principle seems to be countenanced by article 2842 *Civil Code*. *Punty vs. Hood*, 5 *Martin*, N. S. 626, and *Hazzard vs. Boyd*, 4 *Martin's N. S.* 347.

7. Our Code sanctions all agreements not approved by law. Where is the law which forbids two firms from joining in a third, and dividing the responsibilities *per stirpes* instead of *per capita*? They may be liable as common partners, to third persons, but this does not effect the arrangements made between themselves. J. W. Zacharie & Co., were, then, one party interested one half, Harrison, Brown & Co., another, interested in the same proportion. It follows, as a corollary, that J. W. Zacharie & Co. were responsible *in solido* to Harrison, Brown & Co. for their gestion of the affair, and *vice versa*, Blandin, then one of the firm of Harrison, Brown & Co., is liable *in solido* to J. W. Zacharie & Co.

8. What is the law with regard to debtors *in solido* in this state? "The creditor of an obligation contracted *in solido*,

may apply to any one of the debtors he pleases, without the debtor's having a right to plead the benefit of division." *Civil Code*, art. 2089. But, "in joint contracts, all the obligors must be made defendants," *Idem*. 2080. Can language more clearly express the will of the legislator? Is it to be defended by any rules of common law practice? Where our own laws are silent, we may refer for commercial rules to another system, but where they expressly provide for the case, we can look no further. But if we were permitted to do so, the rule of the common law is that non-joinder *must* be pleaded in abatement, *Gow*, 179. 181 n., 146 n., and 147; and this has been settled in *David vs. Eloi*, 4 *La. Rep.* p. 107.

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MATHEWS, J., delivered the opinion of the court.

In this case, the plaintiff claims from the defendant a gross sum of six thousand dollars. He obtained judgment in the court below for three thousand four hundred and eighty-five dollars and ninety-eight cents, from which the defendant appealed.

The claim is made in consequence of various overcharges, as alleged by the petitioner, against the defendant, in rendering final accounts, relating to a joint adventure in merchandise sent from New-Orleans to Tampico, in the republic of Mexico, by J. W. Zacharie & Co., to Harrison, Brown & Co., to be sold by the latter for joint account of the two houses. The amount paid for the goods in New-Orleans, and charges for shipping, is thirteen thousand three hundred and twenty-seven dollars. The gross amount of sales, as rendered by the consignees in Mexico, is fifty-five thousand thirty-nine dollars and forty-three cents, which is reduced by charges to sixteen thousand three hundred fifty-nine dollars and eight cents. Half this sum is allowed to the plaintiff, and he now claims six thousand dollars in addition, on account of improper and illegal charges by the consignees. These unjust charges, as complained of, relate to duties on the goods, commissions, storage, packing, transportation from

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the sea-board to the interior of Mexico, and expenses for remitting the money back, &c.

In relation to the overcharge on account of duties paid to the custom house officers at Tampico, the principal item arises from the difference in amount caused by the payment having been made partly in depreciated paper of the Mexican government, instead of the whole having been paid as charged in account, in current money or specie. As to the other charges, alleged to be exorbitant and erroneous, their propriety depends on the custom of merchants in Mexico, the agreement of the parties to the present suit, and evidence of the case in relation to these points.

Before, however, entering on the investigation of these subjects, we must dispose of certain objections made by the counsel for the appellee, to the plaintiff's right to sue in the present form of action. It is instituted against one only of the partners of Harrison, Brown & Co., claiming judgment against him *in solido*. The defendant being a partner of this firm, which is commercial, as all the partners are answerable *in solido* to creditors of the house, any one of them may be sued separately. Considering J. W. Zacharie & Co., in the sole light of creditors, they most clearly have a right to maintain the present suit. But, if as the truth is, they must be viewed as partners with the house of Harrison, Brown & Co., in this particular transaction, and this partnership be commercial, then it is contended on the part of the appellant, that as the present suit is in character, one for the settlement of accounts, all the partners of the firm doing business in Mexico, should have been made partners to the action. The partnership of J. W. Zacharie & Co., and Harrison, Brown & Co., may be considered as composed of two parties only by the two companies, and as either of them may be legally represented by a single partner of these separate houses, the defendant in the present instance may legally be called to account for the transactions of his firm. If, to this consideration, be added the impossibility of making his other partners parties to this suit, as they do not reside within the jurisdiction of the

Where a partnership as to a single transaction exists between two commercial firms; in an action by one firm for a settlement as to that transaction, it is not necessary to make all the members of the other firm defendants, especially where some of them do not reside within the jurisdiction of the court.

court, no doubts can be entertained of the legality of the present mode of his suit.

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The evidence in relation to the alleged overcharge of duties paid, is not explicit. In the account rendered by the consignees, twenty-five thousand six hundred eighty-four dollars and fifty-three cents, are charged as having been paid. According to a certificate of the collector of the port of Tampico, it appears, if we read it right, that twenty-three thousand three hundred and twenty dollars and fifty-seven cents only were paid at the custom house, which seems to show an overcharge of two thousand three hundred and sixty-three dollars and fifty-six cents, one half of which was made to the prejudice of the plaintiff. Whether this amount was really expended in the exercise of what the merchants of Mexico term economy, but which might bear the harsher name of bribery of the custom house officer, to aid in smuggling goods, we consider an indecent inquiry in a court of justice, and shall, therefore, pass the subject in silence, and will consider the sales *bona fide* paid, as amounting to twenty-three thousand three hundred twenty dollars and fifty-seven cents. Of this amount, the testimony of the cause raises a violent presumption that two thirds were paid in *libranzas*, a species of government paper, which, at the time, was at a discount of about twenty-five per cent. As this means of payment was not procured at the instance and request of the plaintiff, but obtained solely by the consignees, at their own charge and risk, it is contended on their part, that the appellee ought not to be allowed to profit by such payment. We, however, accord in opinion with the judge *a quo* on this point, that as these treasury warrants, if they may be so called, were used in the discharge of a debt, common to both plaintiff and defendant, any benefit resulting ought to be reciprocally enjoyed. As to the charges of commission, we think the court below erred. The goods were shipped to Tampico at the instance of Harrison, Brown & Co., and at the same time an offer was made to J. W. Zacharie & Co., to become equally interested in the adventure, which was accepted, accompanied by a proposition that neither

In such a partnership, the actual amount only which one of the firms may have paid on the merchandise owned in partnership for duties in a foreign port, will be allowed to the firm paying it, and the court will not inquire whether that amount was expended in bribing the custom house officers of the port where the duties were paid.

Where one consignee paid the duties in depreciated government paper, on the consignment on joint account, solely at his own risk, and not at the instance and request of the consignors, held that the consignors were entitled to an equal share of the gain by that mode of payment.

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the consignors or consignees should charge any commissions.

This was refused by the latter, as appears by their letter of the 7th May, 1829, insisting that each party should be permitted to charge the customary commissions of their respective places of residence, and in this mode the business seems to have been finally conducted on both sides. Although the charges on the part of the consignees appear to be exorbitant, the evidence of the case does not authorise us to declare them to be unusual in Mexico.

The goods were transported from Tampico to the interior, and there sold, as appears by accounts of sales, copied into the record. The expenses charged for transportation seem to be very heavy, but nothing shows that they are not such as are customary. It is shown by the evidence, that merchandise is sometimes sold for a kind of currency which is below par, from one and a half to two per cent., and in the winding up of the accounts of sales, a charge is found of four per cent. discount, on account of difference of exchange, freight and escort to the coast. The accounts of sales themselves do not show that the goods were sold for this inferior currency; they must, therefore, be presumed to have been sold for good money, which renders improper the charge for difference of exchange, say one and a half per cent. on forty-nine thousand nine hundred eighty-two dollars, net proceeds of sales in the interior. From the principles above stated, it results that the plaintiff has a right to recover eleven hundred eighty-one dollars for overcharge of duties, one thousand nine hundred forty-three dollars and thirty-seven cents difference between *libranzas* and currency, and three thousand seventy-four dollars and eighty-seven cents difference of exchange, improperly charged, and commissions of plaintiff's cotton goods shipped, amounting to three thousand eight hundred sixty-one dollars and fifty-four cents.

The signing of an account by one of the parties acknowledging its correctness, is not conclusive against a correction of gross errors in fact, or mistakes as to the legal rights of the parties.

As to the approval of the acts by Patterson, a partner of the house of J. W. Zacharie & Co., the only evidence in support of it is found in the answers to interrogatories of a brother of the defendant. The accounts are not signed by the person said to have acknowledged their correctness, and

even if they had been, such approval ought not to be held as conclusive against a correction of gross errors in fact, or mistakes as to the legal rights of the parties.

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Why, then, any of the money for which the goods were sold remains uncollected at this time, does not appear from the evidence. The firm of Harrison, Brown & Co., by remitting the full amount of the sum, which, according to the estimate, was due to the plaintiffs, seem to have virtually agreed that collection has been duly made, or that they took on themselves the responsibility of collecting.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled, and it is further ordered, adjudged and decreed, that the judgment be here rendered in favor of the plaintiff and appellee, and against the defendant and appellant, for the sum of three thousand eight hundred sixty-one dollars and fifty-four cents, with costs in both courts.

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APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE
OF THE SECOND PRESIDING.

The articles 586 and 896, of the *Code of Practice*, are not absolutely contradictory, and are to be construed so as to give full effect to both.

The certificate of the clerk alone that the record contains a copy of all the documents on file, a transcript of all the proceedings had, and all the testimony adduced, authorises the Supreme Court to examine a case on the merits.

It seems that the appointment of an administrator is necessary in every case, where a succession is accepted by heirs who are all of full age.

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Article 327, of the *Louisiana Code*, does not relate to a succession of which a tutor has already the administration by virtue of his tutorship. It refers to estates which may descend to his wards during their minority.

The tutor can under authority of general administration, collect and sue for, if necessary to such collection, debts due to the succession.

When an estate is accepted, with the benefit of inventory, and some of the heirs are of full age, while others are minors, it should be left to the administration of the tutor until partition. In suits to recover debts due to the succession, the heirs of full age and the tutor of the minor heirs should concur.

Where a mortgage is reserved upon the undivided moiety of a certain tract of land, a subsequent partition does not alter the nature and effects of the contract of mortgage.

This suit was brought to obtain the seizure and sale of certain property, by virtue of a claim of mortgage for the payment of the sum of five thousand dollars. The plaintiffs were Lavinia Erwin, widow of Joseph Erwin, deceased, Eliza Wilson, Isaac Erwin, Leodocia Erwin, wife of William B. Robertson, and by him assisted, Charles H. Dickinson, Thomas R. Erwin, Lavinia Erwin, wife of Warren Acorn, Lavinia Erwin, as tutrix of the minor children of John Erwin, deceased, and as administratrix of Joseph Erwin, an insane and interdicted person, all of the parish of Iberville, Nancy Erwin, wife of Andrew Heynes, and by him assisted, John B. Craighead, natural guardian and tutor of Joseph E. Craighead and Thomas B. Craighead, of Davidson county, state of Tennessee, heirs and representatives of the late Joseph Erwin, and all accepting under the benefit of inventory.

The plaintiffs allege that their ancestor, on the 24th day of January, 1826, was seized, of a tract of land situate on the west or south side of the bayou Grosse Tête, in said parish,

being numbers 30, 31, 32 and 33, of the lots laid out and sold by the United States, on the said bayou, on the south or west side thereof, agreeably to the limits established in the surveys made by the direction of the government of the United States, said lots containing six hundred and fifty-one acres and eighty-one hundredths of an acre, together with the buildings thereon, and the bridge constructed across said bayou, on the front thereof. That the said Joseph Erwin then sold to Joseph Orillion, one undivided moiety of the tract, buildings and other appurtenances, for the sum of five thousand dollars for the land, payable at certain specified periods. Orillion was also to pay one half of the value of the bridge, and the buildings to be estimated by certain referees.

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On the 24th day of September 1827, Joseph Erwin sold to Don Louis Rosemond Orillion, the remaining undivided half of the tract of land, together with an equal and undivided half of all the buildings on the land, and the bridge.

On the 12th day of March, 1829, Joseph Orillion and Don Louis Rosemond Orillion, by public act, made a *partition* of the property.

Joseph Orillion excepted to the petition, for want of proper parties plaintiffs on the following grounds:

First, Because the plaintiffs do not sue, as heirs, pure and simple, of Joseph Erwin.

Second, Because they do not, nor does any one of them sue as administrators or administrator, of Joseph Erwin's estate.

Third, Because the estate of said Joseph Erwin is not properly represented in this suit.

Fourth, Because the said estate is accepted under the benefit of an inventory, and consequently the same must be administered by an administrator, legally authorised and appointed, and by such administrator only this suit can be brought.

Fifth, Because the plaintiffs do not show any proper and legal quality, capacity and authorisation, to maintain and support this suit.

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These exceptions were overruled. He then pleaded the general denial, and a special denial of the alleged heirship of the plaintiffs. He admitted his purchase, and that of Rosemond Orillion from Joseph Erwin, and the partition between him and Rosemond Orillion, as alleged. He averred that by an agreement entered into with Erwin, he was entitled to keep the land as long as he pleased, on the payment of six per cent. interest on the unpaid purchase money. He pleaded payment to the widow of one thousand dollars.

The plaintiffs had judgment, and the defendant appealed.

The judge *a quo* gave no certificate. That of the clerk was in the following words.

"I, John A. Hause, clerk of the Fourth District Court, in and for the parish of Iberville, do certify the foregoing eleven pages, to contain a true and correct copy of all the documents on file, transcript of all the proceedings had, and all the testimony adduced in the case," &c.

The appeal was made returnable on the first Monday in July last. In January last the assignment of errors was filed.

Labauve, for defendant and appellant.

1. The court below erred in overruling the exception of defendant, made to the plaintiffs' right of action, as beneficiary heirs of Joseph Erwin.
2. The judge below erred in not allowing to the defendant, the credit of one thousand dollars, pleaded in payment and proved by an authentic document, made part of the answer.
3. The court erred in decreeing a mortgage on defendant's land *in toto*, the pleadings showing clearly, that in law plaintiffs had a mortgage on the undivided half only, and not on the whole.
4. The plaintiffs, as heirs under the benefit of an inventory, had no right to bring this suit, and the exceptions by defendant made to such right, were well taken and improperly overruled. *Civil Code, arts. 1034, 5, 1041, 2.*

5. There is no evidence of Joseph Erwin's death, nor that the plaintiffs are heirs in the manner they style themselves.

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6. The judge below erred in not allowing credit to defendant, for one thousand dollars, proved to be received by Lavinia Erwin, one of the plaintiffs. The declaration or acknowledgment of the counsel, on the back of the judgment within, does not correct the error and relieve the defendant, the counsel after the signing of the judgment, had no right to do so, and did not bind his clients thereby.

7. Defendant had good reason to fear a disturbance, and the court should have decreed the plaintiffs to give security, as required by law, in such a case.

8. The court below erred in decreeing a mortgage on defendant's land *in toto*. The plaintiffs have a mortgage on the undivided half only, and the other half is clear and free of all mortgage, as regards the plaintiffs. The partition made between defendant and Rosemond, did not as a matter of course, fix the mortgage on the land assigned to defendant, and release the one assigned to Rosemond. The partition was a matter of agreement, which can bind but the parties thereto. *Civil Code, art. 1883*. From this principle it is contended, that the mortgage was not changed or altered in any shape or form, and that it stood as before on the undivided half.

MATHEWS, J., delivered the opinion of the court.

It is moved on the part of the appellee, to dismiss this appeal, on the grounds that there is no statement of facts, or any thing equivalent, and that an assignment of errors of law, apparent on the record, was not made and filed in due time.

An assignment of errors was not made in the manner directed by the *Code of Practice, see art. 897*; for none was filed within the time limited by that article. Consequently, if there be no statement of facts, nor certificate of the judge or clerk of the court below, as required by law, the appeal

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should be dismissed. In the present instance, a statement of facts, properly so called, is out of the question; it is not pretended that any was made, in either of the modes prescribed, and the record contains no certificate of the judge *a quo*, in relation to the facts of the case, in pursuance of the 586th article of the *Code of Practice*. This article seems to require a certificate of the judge, when the testimony produced in a cause has been taken in writing, declaring that the record contains all the evidence adduced by the parties. But the article 896, (by implication) gives power and authority to the clerk of the lower court, to certify the record as containing all the testimony adduced. The article immediately preceeding, (very properly) denies to the Supreme Court the exercise of its jurisdiction, except so far as it may have knowledge of the matters argued or contested below.

The object of an appeal being to correct the errors of the inferior tribunals, both in relation to the law and facts of a case, an attempt by the appellate court, to reverse the judgment rendered in the first instance, by an examination of the entire cause, without a moral certainty that all the matters contested upon were before it, would be vain and absurd. It seems, therefore, to have been the intention of the legislature, in the various acts passed, relative to the manner of bringing appeals, to facilitate them as far as might be consistent with the certainty of all the matters in litigation, being fairly and fully exhibited to the Supreme Court. The laws passed on this subject have been somewhat multifarious, (and as is too apt to the case, without great precaution on the part of the legislature, when many laws are enacted, touching the same subject matter) they have the appearance in some degree, of confusion and contradiction.

At the organization of the Supreme Court, by the act of 1813, it is believed that only one mode was pointed out for bringing a cause fully before the appellate tribunal, which was by a statement of facts, made out by the parties, and in the event of their disagreement by the judge of the lower court. By a subsequent act, either party might require the testimony adduced to be taken in writing, to serve as a

statement of facts on the appeal. Their was also another law, authorising the judge to certify the record, as containing all the facts when the entire evidence consisted of written documents. Thus the law on this subject stood, until the adoption of the Code of Practice, and in it many of the former rules have been retained. The decision of the present case, depends, however, mainly on an interpretation of the various articles of this Code, which treat of the manner of bringing up appeals, particularly those relating to the direct modes in which the faults of a cause are to be made known to the appellate court. There is an apparent discrepancy between the articles 586 and 896. The former seems to require a certificate of the judge to verify the record as containing all the evidence adduced in a suit, whilst the latter impliedly gives the same force and effect to a certificate of the clerk. These laws are to operate *in pari materia*; and according to one of the rules of interpretation, effect must be given to both, unless palpable absurdity would result from such interpretation, or the laws themselves be positively contradictory, in which event the first would be abrogated by the last, according to the maxim that *Leges posteriores priores contrarias abrogant*. But in the present instance, these articles of the code are not absolutely contradictory in their provisions, nor would any gross absurdity be the consequence of considering them both in force; to give full effect to both, seems to us to be in accordance with the intention of the legislature, to facilitate the re-examination of causes in the Supreme Court, so far as may be consistent with proper certainty in transmitting the facts.

In the case now under consideration, we have the certificate of the clerk, that the record contains a copy of all the documents on file, a transcript of all the proceedings had, and all the testimony adduced, &c., which in our opinion renders it necessary for us to examine the cause on its merits.

The suit is brought by the widow and heirs of Joseph Erwin, against the defendant, to recover from him the price of one half of an undivided tract of land, sold by their

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The articles 586 and 896, of the Code of Practice, are not absolutely contradictory, and are to be construed so as to give full effect to both

The certificate of the clerk alone, that the record contains a copy of all the documents on file, a transcript of all the proceedings had, and all the testimony adduced, authorises the Supreme Court to examine a case on the merits

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ancestor. The widow sues as tutor for some of her children, who are stated to be minors, the other heirs appear to be fairly represented in court, and all accepted the inheritance of their father under the benefit of an inventory. The plaintiffs obtained judgment in the Court below, from which the defendant appealed.

The answer does not deny the capacity of the plaintiffs as heirs, but an exception is pleaded to their right to prosecute the action in its present form. The succession having been accepted with the benefit of an inventory, the defendant contends, that it cannot be legally administered, unless by an administrator appointed for that purpose, in pursuance of certain provisions of the *Louisiana Code*, found in chapter 4, section 3, relating to the benefit of an inventory and the delays for deliberating. The articles which treat of the appointment of an administrator, are from 1034 to 1040 inclusive. They seem to require the appointment of an

It seems that the appointment of an administrator is necessary in every case, where a succession is accepted by heirs who are all of full age.

administrator in every case where a succession is accepted with benefit of inventory. That such an officer must be appointed when the heirs are of full age, under every circumstance, without regard to the manner in which the inheritance is thrown on them, is most probably true. The duties and responsibilities imposed by law on an officer of this kind, are similar to those of curators of vacant estates; so also are his powers. But in cases requiring the appointment of tutors, we are of opinion that a just interpretation of the articles of the Code under consideration, will lead to a different result. A tutor duly appointed, or one on which the office devolves by the operation of law, represents the minors under his care in all civil acts, and has the administration of their estates. See *La. Code*, art. 327. Now any other article of the Code which provides another administration for an estate to which one is already given by law, necessarily involves inconsistency, and would lead to confusion and useless expense. An interpretation of laws producing such consequences, would imply a most palpable absurdity in the laws themselves, or want of wisdom in the interpretation. The apparent incompatibility between the article 1037th of

The interpretation of a law is inadmissible, which provides another administration for an estate to which one is already given by law.

the Code and that last cited, we think admits of reconciliation in a way to give effect to both. The article last cited provides, that "if all the beneficiary heirs be minors, then tutors or curators can claim the preference for the administration," &c. This provision of law certainly does not relate to a succession of which a tutor has already the administration, by virtue of his tutorship. It must therefore have reference to estates which may descend to his hands during their minority, and ought not to be considered as having any influence on an estate, the administration of which is imposed on him in the legal exercise of his functions as tutor; and such administration he has and must exercise in pursuance of the provisions of the article 327. His right under authority of general administration to collect and sue for, if necessary, to such collection, debts due to the succession cannot be fairly questioned.

A case like the present, when part of the heirs appear to be of full age, and part minors, presents greater difficulty, and seems not to be provided for by law.

An estate accepted under the benefit of an inventory, should be administered as an entire thing for the advantage of creditors and heirs, until partition be made. No one of the heirs who may have attained the age of majority, nor indeed the whole of them, in their capacity of heirs, have a right to the administration of a succession, without authority derived from competent power; and where they are united with co-heirs who are minors, and consequently under the protection of a tutor, it appears to us to be the most reasonable and beneficial course that could be adopted, to leave a succession thus situated to the administration of the tutor until partition. But as the heirs of age are not represented by the tutor in the event of suits to recover debts due to the succession, they should concur in the prosecution of such suits, as has been done in the present case.

The evidence fully establishes the claim of the plaintiff, and there is no evidence on the record to show that the defendant is in danger of eviction from the land by him purchased, or of disturbance in his possession.

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Article 327, of the Louisiana Code, does not relate to a succession of which a tutor has already the administration, by virtue of his tutorship. It refers to estates which may descend to his hands during their minority.

The tutor can, under authority of general administration, collect and sue for if necessary to such collection, debts due to the succession.

When an estate is accepted, with the benefit of inventory, and some of the heirs are of full age, while others are minors, it should be left to the administration of the tutor until partition. In suits to recover debts due to the succession, the heirs of full age and the tutor of the minor heirs should concur.

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Where a mortgage is reserved upon the undivided moiety of a certain tract of land, a subsequent partition does not alter the nature and effect of mortgage.

The evidence of the case shows, that the ancestor of the plaintiffs sold the remaining undivided half of the tract of land to Lewis Rosamond Orillion, who thereby became a tenant in common with the defendant of the whole tract; and that the two purchasers holding in this manner, made a partition, by which a specific portion was assigned to the first purchaser, &c. The court below decreed the mortgage reserved on the undivided half sold to the defendant, to bear entirely and exclusively on the portion which had been specifically allotted to him by the partition between the joint tenants. The mortgage was reserved on an undivided half of the whole tract, and could in this manner alone have been enforced had no change taken place on the tenure of the defendant. The change in this respect, which results from the partition above stated, cannot, in our opinion, alter the nature and effects of the contract of mortgage; it affects an undivided moiety; but as the defendant transferred by partition the half of his undivided portion to his co-tenant; as to this part of the tract the latter must be considered as a third person, and in order to enforce the mortgage on it, pursuit should be made as required by law in such cases. We think the court below erred in this part of its judgment. The judgment was rendered for two much; no credit having been given for one thousand dollars paid to Mrs. Erwin, one of the defendants; but as a remittitur was entered for this amount by them, the error might be considered as cured, and would not alone require the judgment to be reversed. The error, however, in relation to the decree of seizure under the mortgage must be corrected.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled. And it is further ordered, adjudged and decreed, that the plaintiffs and appellees do recover from the defendants and appellants the sum of five thousand dollars, together with interest at the rate of six per cent. per annum on one thousand dollars, from the 1st day of April, 1828; like interest on one thousand dollars from the 1st of April, 1829; same

interest on one thousand dollars from the 1st of April, 1830; same interest on one thousand dollars from the 1st of April, 1831; and the same interest on one thousand dollars from the 1st of April, 1832, until the whole sum of five thousand dollars be fully paid off, &c.

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And it is further ordered, adjudged, and decreed, that one undivided half of the lots designated as Nos. thirty-two and thirty-three and constituted an undivided half of the entire tract sold by the ancestor of the defendants, to Joseph Orillion and L. R. Orillion, and which lots are now in the possession of the defendant, be seized and sold under the mortgage reserved. Reserving the right of the plaintiff to prosecute their mortgage on one half of lots Nos. 30 and 31, in the possession of L. R. Orillion, or in the hands of any third possessor according to law. It is further ordered, adjudged, and decreed, that the whole amount of this judgment shall be credited by one thousand dollars, to be deducted from the aggregate of principal and interest due at the date of the receipt; say the 20th of September, 1831, and that the appellees pay the cost of this appeal.

CAVELIER, F. W. C. vs. GERMAIN.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The 1787th article of the *Civil Code*, has no relation to the opposition on the part of the vendee to carry into effect the adjudication to him of minor's property, ratified by a family meeting subsequently held, on the ground that the bond of the tutor was not given within two days after the adjudication.

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which gives the contract its binding force. Both parties must be bound, or neither.

The auctioneer's acceptance of the last bid, on the adjudication of the property of a minor, is the acceptance and sale of the tutor, and if the person acting in that capacity has not given security, there is no legal acceptance of the bid.

The subsequent ratification of a sale made under such circumstances by a family meeting, on the application of the purchaser, might have rendered the adjudication valid, but such a ratification is of no avail when obtained on behalf of the minor.

The plaintiff is the grandmother and tutrix of three minor children of Felicité Tagiasco, who died in 1833. On her petition a family meeting was convened, which determined that it was for the interest of the minors, that a house belonging to them, situated in St. Peter street, in the city of New-Orleans, should be sold on certain conditions.

The proceedings of this meeting were homologated, and the sale was made on the 11th of June, 1833, by the Register of Wills, agreeably to the order of the judge of probates. It was adjudicated to the defendant for two thousand nine hundred and twenty-five dollars.

On the 13th of the same month, the plaintiff presented her petition offering her bond with surety for the fulfilment of her duties as tutrix. The surety offered was accepted, and the bond on the same day entered into.

The plaintiff then presented her petition, stating that the defendant refused to comply with the conditions of the sale of the property, and that her wards' interest required the ratification of the sale, and prayed that a family meeting might be convened to consider the propriety of ratifying the sale, or of having a second sale made.

The judge ordered the family meeting accordingly. It determined in favor of ratifying the adjudication.

The plaintiff then obtained a rule on the defendant to show cause why he should not comply with the conditions of

the sale. The rule was, after hearing both parties, made absolute, and the defendant appealed.

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Rousseau, for defendant and appellant.

Mercier, *contra*, contended the sale was valid, because the formalities prescribed by the articles of the *Civil Code*, 1787 and 1788, have been complied with in due time.

MARTIN, J., delivered the opinion of the court.

The defendant on a rule to show cause why he should not be decreed to comply with the conditions on which a house and lot, the property of the minor wards of the plaintiff had been adjudicated to him, urged that the plaintiff did not give the bond required by law, from her as tutrix, till two days after the adjudication.

She showed that after the adjudication, she under an order of court, submitted it to the consideration of a family meeting, whether it was for the interests of the minors to have a new adjudication made, or the former ratified, and their opinion, which was for the latter alternative, was concurred in by the widow tutrix.

The rule was made absolute; the court of probates expressing its opinion that the property had been sold under an order of court, granted on the advice of a family meeting, and a subsequent family meeting had ratified the adjudication, made two days before the tutrix gave bond.

The defendant appealed.

The plaintiff and appellee's counsel has contended that the formalities prescribed by the *Civil Code*, 1787 and 1888, having been complied with in due time, the adjudication became thereby perfect.

The article 1787 does not appear to us to have any bearing on the present case.

The article 1788 authorises a person contracting with an incapacitated person to have, on disproving his error, the contract affirmed or annulled by the person having the care

The 1787th art. of the *Civil Code* has no relation to the opposition on the part of the vendee to carry into effect the adjudication to him of minor's property, ratified by a family meeting

EASTERN DIS. of the affairs of the incapacitated individual, or by a family
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subsequently held,
 on the ground that
 the bond of the
 tutor was not
 given within two
 days after the ad-
 judication.

This is the converse case, for the application to confirm is made in behalf of the incapacitated person.

We have not been favored with an argument on the part of the appellant.

It appears to be admitted by the appellee, that the property of the minors did not pass by the adjudication to the last holder, in other words that there was no sale; and we are called upon to say whether a new contract of sale, binding on the appellant, may result from posterior proceedings, to which he gave no assent and to which he was not a party.

It is the assent
 of a party, or that
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 Both parties must
 be bound or nei-
 ther.

It is the assent of a party, or that of the person he contracts with, which gives the contract its binding force. Both parties must be bound or neither.

The sale of a minor's property must be made by his tutor, by the ministry of an auctioneer. It is the tutor who sells, and a tutor cannot sell until he has given surety. The bid of the appellant was offered to and accepted by an auctioneer, who lent his ministry to the tutor. His acceptance of the bid and adjudication was the acceptance and sale of the tutor, and if the person who was acting in that capacity was not qualified to act, according to law, there was no legal acceptance of the bid, no legal adjudication of the property. On the application of the appellant, if the family meeting had ratified the sale, it might, under the *Civil Code*, 1788, have been legal because the appellant's application accepted on behalf of the minor, by the family meeting, would have proved a perfect contract; but as the application could not have formed a contract, without its acceptance by the family meeting, so the determination of the family meeting cannot constitute a contract without the intervention of the appellant.

The subsequent
 ratification of a
 sale made under
 such circum-
 stances by a fam-
 ily meeting, on the
 application of the
 purchaser might
 have rendered the
 adjudication val-
 id, but such a rati-
 fication is of no
 avail when ob-
 tained on behalf
 of the minor.

A ratification binds the party who ratifies, but not the other party to the contract, who not being bound by an imperfect contract, cannot become so, *nolens volens*. For it must not be in the power of a party to an imperfect contract

to avail himself of and repudiate it at any time, as he may be prompted by his interest or caprice.

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vs.
DE LA ROSA.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court of probates be annulled, avoided and reversed, and the rule obtained against the appellant discharged, the appellee paying costs in both courts.

GOTTSCHALK vs. DE LA ROSA.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a slave is adjudicated at auction on a credit, and the vendee refuses to comply with the terms of the sale; in the action brought against him the plaintiff should claim a compliance with these conditions or immediate payment; but in such a case, if the plaintiff demands an absolute judgment for immediate payment, the prayer for general relief will enable the supreme court to examine the case on its merits.

The plaintiff sold to the defendant for five hundred and sixty dollars, a female slave with a child, by public auction, on the 11th of May, 1832. The terms of payment were the purchaser's note payable in six months, with a satisfactory endorser. The slaves were delivered to the defendant, who refused to comply with the conditions of the sale.

Judgment was prayed for the amount of the purchase money. There was, also, a prayer for all other and further relief, which the nature of the case and equity required.

The defendant averred, that he had learned the mother was free, and that she had been kidnapped in Alabama; that she and her child were voluntarily remaining under his protection. He prayed that the sale be annulled, and the mother and child be decreed free.

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DE LA ROSA.

In his amended answer, he alleged that suit had been instituted against him by the mother and her child for their freedom, and that the suit was then pending. He denied the right of the plaintiff to sue until that suit had been determined.

Judgment was rendered declaring the action premature. The plaintiff appealed.

Strawbridge, for plaintiff and appellant, contended there was error in the judgment, which should have been rendered for the plaintiff on the merits.

Janin, contra, urged that the judgment of the District Court be amended, and that there be judgment in favor of defendant on the merits, rescinding the sale, because

1. The pretended slave, Polly Jones and her child Mary, are free.

2. If their freedom were not sufficiently proved by the evidence on record, they were introduced into this state contrary to the laws thereof and with fraudulent papers, which circumstance will forever prevent the defendant from holding the said Polly and Mary as slaves, and exercising the rights of ownership over them.

MATHEWS, J., delivered the opinion of the court.

In this suit the price of a mulatto woman and her child is claimed from the defendant, as purchaser at a sale by auction. The conditions of the sale was that a note should be given, satisfactorily endorsed, payable six months after date. This condition, it is alleged, the defendant refused to comply with, and the immediate payment of the price, was claimed in the present action, &c.

The defendant pleads, as a defence against the recovery of the price, freedom of the persons sold; and that they had been introduced into the state contrary to the acts of the

legislature, as they then existed, relating to the introduction of slaves, &c.

The court below dismissed the suit as having been prematurely brought, and the plaintiff appealed.

The points filed on the part of the defendant in the Supreme Court, correspond with the pleas above stated.

The action is not brought in the most correct form, it would have been more technical, had it been instituted in the alternative, requiring the defendant either to comply with the condition of the sale or pay the price. There is, however, a prayer for general relief, which we believe enables us to decide the cause on its merits, and as the term of payment has long since elapsed, justice requires that this should be done.

Freedom, as pleaded, is not supported by the evidence of the case. But the defendant has also pleaded an action pending against him, commenced on the part of the slaves now in controversy, to recover their liberty, and the tendency of such suit is admitted to be true.

As to the laws relating to the introduction of slaves into the state, relied on by the counsel for the appellee, they have been all repealed; consequently, persons who dealt in slaves, even admitting that they were introduced contrary to those laws, are no longer liable to suffer the penalties inflicted, and freedom of the slaves was not a consequence of the violation of law in their introduction.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled, and that the suit be reinstated. And proceeding here to give such judgment as, in our opinion, ought to have been given in the court below. It is, further, ordered, adjudged and decreed, that the plaintiff and appellee do recover from the defendant and appellant, the sum of five hundred and sixty dollars, with interest at the rate of five per cent per annum, from the 11th of November, 1832, until paid, with costs in both courts. But it is ordered, that no execution shall issue on this judgment, until the plaintiff

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Where a slave is adjudicated at auction on a credit, and the vendee refuses to comply with the terms of the sale, in the action brought against him, the plaintiff should claim a compliance with those conditions or immediate payment; but in such a case, if the plaintiff demands an absolute judgment for immediate payment, the prayer for general relief will enable the Supreme Court to examine the case on its merits.

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give to the defendant, good and sufficient security, to be approved of by the court below, to save and keep the latter free from all injury which may accrue in the event of the slaves establishing their claim to freedom, in the suit now pending for that purpose.

MILLAUDON vs. CAJUS.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF NEW-ORLEANS.

The 1172d article of the *Louisiana Code*, does not apply to the case of an executor who seeks to distribute the net proceeds of an estate among the heirs. In that case the persons concerned are not to be cited in the manner prescribed in that article, which is restricted to cases in which nothing is sought but the sanction of the Court of Probates to the payment of creditors.

The case of an executor called to account by the heirs, has no bearing on that of an executor who seeks to distribute the net proceeds of an estate among the heirs.

The presence of a party at and his subscribing the inventory, cannot authorise the executor to consider him as constantly in court and bound to take notice of any account which the executor may subsequently file, so as to be precluded from contesting any part of it, unless a written opposition be filed within three days.

A party against whom judgment is given, cannot, when he does not appeal, avail himself of its reversal on the appeal of a party joined with him in the inferior court.

Henrietta Roche, widow of the late Arnaud Magnon, died on the 5th of February, 1833, and by her will, executed on the 25th of January, 1821, she appointed as her executors her said husband and Jean Baptiste Cajus.

Arnaud Magnon died on the 4th of December, 1821, having by his will appointed his wife as his executrix, who declined the trust, and Jean Baptiste Cajus, who accepted it, and received letters testamentary accordingly.

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The will of the widow was admitted to probate, and Cajus recognised as the executor of the estates of Mr. and Mrs. Magnon.

On the 7th August, 1833, Cajus presented his petition, showing that he had fully administered the joint and several estates of the decedents, filing the account of his administration, averring his readiness to produce the proper vouchers when required, and partitioning the property of both estates according to the respective wills. He prayed for the approval and homologation of the account, for the payment to the heirs and legatees of the sums respectively due them as therein stated, and for his discharge as executor.

The judge, on the same day, ordered the creditors of the estates and all others interested, to show cause within ten days why the account filed should not be homologated, and the executor discharged from his trust.

On the 19th of the same month, on motion of the executor's counsel, and on giving the court to understand that no opposition to the account had been made, though regularly advertised by the Register of Wills, during ten days and more, and with the consent of the attorney for the absent heirs of the widow Magnon, the judge *a quo* ordered the homologation of the account, and payment to be made in conformity therewith. This judgment was signed on the 31st of the same month.

Laurent Millaudon filed an opposition to the account, stating that he was the transferee and purchaser of the rights of Margueritte Magnon and Miss Lastrade, as legatees of the late Arnaud Magnon. He opposed the homologation of the account on the ground of overcharge of commissions; of improperly charging him, as said transferee, with a portion of the fee of the counsel of the executor of widow Magnon; and with expenses of the inventory of her succession; and with certain other items of charge. He averred the account to be illegal as to the item of the funeral expenses, it being

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in gross; as to the charge of rents for the same reason. He prayed its amendment in the several particulars of which he complained.

On the 20th of the same month, the opponent obtained a rule *nisi*, the executor to set aside the judgment homologating the account, on the grounds that the requirements of the law had not been complied with.

On the return day, the thirty-first of the same month, the judge discharged the rule, and set aside the opposition which had been filed without leave on the 19th of the same month, after the adjournment of the court.

Millaudon appealed.

Macready, for appellant, contended as follows:

The judgment ought to be annulled, because Millaudon being the owner of one half of the succession of Magnon, as purchased from two of Magnon's heirs, ought to have been personally cited to show cause why the tableau should not be homologated and judgment rendered thereon. He was not cited, *Code of Practice*, 606, 609, and judgment was rendered against him. The case of *Merchand vs. Garcia*, 4th *Louisiana Reports*, 300, refers to the proceedings to be conducted under 1000 and 1004, when the the heirs cite the executor to render his account, they are then all in court. This case is clearly distinguishable from that where the account is rendered without the knowledge of the heir.

D. Seghers, contra.

MARTIN, J., delivered the opinion of the court.

Millaudon, the assignee of the shares of two of the heirs, is appellant from the decree which homologates a tableau of distribution of the property of these two estates, by Cajus, who was executor for both.

The defendant claims a reversal of the decree, on a suggestion that it was rendered without his having been cited or notified, and that it is contrary to law and evidence.

The counsel of the executor has replied that the appellant was a party to the proceedings of the Court of Probates, on the estates, having been present and having subscribed the inventories; that the usual advertisements of publications, notifying all persons concerned, were made in the gazettes; that the appellant ought to have filed his opposition to the tableau, if he had any, within three days and in writing; that he filed an opposition after the adjournment of the court, on the day the deed was rendered, and obtained a rule to show cause on the executor, which rule was afterwards discharged. He has relied on the *Louisiana Code*, 1172 and 4. *Louisiana Reports*, 300.

The appellant's counsel has relied on the *Code of Practice*, 606, 9.

These articles of the *Code of Practice*, are relied on to establish the rights of the party, enforced by a judgment rendered without his having been cited to have it annulled or reversed.

The article of the *Louisiana Code*, cited by the appellee's counsel, authorises indeed the executor who desires the authority of the Court of Probates to pay creditors, to call all persons concerned, to appear and file their opposition. This may likely prevent an heir who has neglected to oppose payments to creditors, to contest their legality; but the article has no application to the case of an executor who seeks to distribute the net proceeds of an estate among the heirs; this must be done *vocatis vocandis*, and the persons concerned are not to be cited in the mode prescribed by the article 1172, which must be restricted to cases in which nothing is sought but the sanction of the court to the payment of creditors.

The case in 4 *Louisiana Reports*, is that of an executor called to account by the heirs. It decides that when the account is filed, the heirs must state their opposition in writing within a fixed period. This case has no bearing on the present.

The presence of the appellant at, and his subscribing the inventory, cannot authorise the executor to consider him as

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The 1172d art. of the *Louisiana Code*, does not apply to the case of an executor who seeks to distribute the net proceeds of an estate among the heirs. In that case the persons concerned are not to be cited in the manner prescribed in that article, which is restricted to cases in which nothing is sought but the sanction of the court of probates to the payment of creditors.

The case of an executor called to account by the heirs has no bearing on that of an executor who seeks to distribute the net proceeds of an estate among the heirs.

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The presence of a party at and subscribing the inventory, cannot authorise the executor to consider him as constantly in court, and bound to take notice of any account which the executor may subsequently file, so as to be precluded from contesting any part of it, unless a written opposition be filed within three days.

constantly in court, and bound to take notice of any account, the executor may file at any subsequent period, so as to be precluded from consulting any part of it, unless a written opposition be filed within three days.

The rule obtained by the appellant, with the view of affecting the decree of the Court of Probates, and the discharge of that rule, cannot have the effect of curing so palpable a defect in the decree, as that of having been rendered against a party sought to be bound thereby, without his having been legally cited or notified.

It is therefore ordered, adjudged, and decreed, that the judgment of the court of probates be annulled, avoided and reversed, at the costs of the appellee.

D. Seghers, for appellee moved for a re-hearing on the following grounds:

All objections to accounts of executors must be made in writing, within three days after the account is filed. 4th *Louisiana Reports*, 300. *Marchand vs. Cavalier*.

1. The suggestions made by the appellant that the judgment of the inferior court was rendered without his having been cited, comes too late. It was made, for the first time, on the very day of trial before the Supreme Court, viz. on the 21st January, 1834. The points containing this strange allegation, were filed on that day without their having ever been communicated to us, so that we were left entirely in the dark, and taken on purpose by surprise, as to the plea on which the appellee intended to rely. This plea ought to have been specially set out at length in the inferior court.

2. The opinion manifested by this court with regard to *personal notice*, is contrary to the universal course followed throughout the state on this particular point. The general impression has been that the duties and powers of executors, curators of vacant estates, and administrators were the same, and that those parts of the Code which had relation to the former, had also a bearing on the latter. Thus, we see by article 1042 of the *Louisiana Code*, that administrators have

the same powers, and are subject to the same duties and responsibilities as the curators of vacant estates; and by article 1663, that executors must proceed to the sales and to the payment of the debts in the manner prescribed for curators of vacant estates. Now, if article 1172 was to be explained by itself alone, it might, perhaps, be understood as applying exclusively to creditors; but it must be taken in conjunction with article 1057, whereby legatees are placed on the same footing with creditors. The notice there required to be given, (in the French text, *avis*), is not a personal notice, but a public advertisement in the newspapers. Such has been the construction given to that article, 1057, by universal practice, and it appears to be founded on law.

3. The court have annulled the judgment of the inferior tribunal in all its parts, though it never should have been reversed, in any case, except only as far as Millaudon may be concerned. The estates are nearly settled, all the creditors have been paid, and all the heirs and legatees, except Millaudon, have received their shares. What a confusion would it not create if the decree was not amended in that respect! Should the court, therefore, persist in this opinion, that the decision of the judge below is erroneous, still his judgment ought not to be disturbed, except as relates to Millaudon; and even then, with directions to the inferior judge, to disregard all that part of Millaudon's opposition concerning payments made to creditors. This is in strict accordance with the doctrine laid down by this honourable court, in the very opinion of which we now complain. "This article, 1172," says this court, "*prevents* an heir who has neglected to oppose payments to creditors, to *contest their legality*."

Macready, contra.

The opinion of the court overruling the motion, was delivered by MARTIN, J.

We have been requested to grant a re-hearing, (among other grounds) because the judgment of the lower court is reversed absolutely, while it ought to have been so as to the

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appellant; all the parties against whom it was given, not having appealed; and, because, in remanding the case for further proceedings, we have not instructed the judge not to suffer the payments authorised by the homologation, to be contested.

It is so clear a point that a party against whom judgment is given, cannot avail himself when he does not appeal, of its reversal on the appeal of a party joined with him below, that it is absolutely unnecessary to qualify the reversal of the judgment.

A party against whom judgment is given, cannot when he does not appeal, avail himself of its reversal on the appeal of a party joined with him in the inferior court.

In the reasonings which lead to the conclusions we came to, an heir who had neglected to appear on a publication requiring *all persons concerned* to come and oppose if they saw fit, the leave prayed for by the executor to pay creditors, was concluded from contesting such judgment after the homologation. The opinions thus expressed, have no need, in our opinion, of being repeated at the end of the denial.

The re-hearing is, therefore, refused.

**HILIGSBERG vs. NEW-ORLEANS CANAL AND BANKING
 COMPANY ET AL.**

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In an action to rescind the sale of a slave, on account of his habit of running away, proof that he ran away three times before the sale, without proof of the period the slave was absent at either time, is insufficient to support the claim.

The defendants sold to the plaintiff, and warranted against the vices and maladies prescribed by law, eleven slaves at public auction for the sum of seven thousand four hundred

and thirty dollars. The plaintiff now alleges that one of them was, previous to the purchase, addicted to the vice of running away, and on that ground he prayed to rescind the sale.

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The Canal and Banking Company pleaded the general denial and prescription. The other defendants pleaded that the defendant had lost all right to hold the defendants responsible, by not having previously informed them of the facts charged, and by not having complied with the requisites of the law, in advertising the slave.

Bertrand, in answer to an interrogatory relating to the slave in question, deposed that "he ran away twice before the sale." *Berquier* testified that after the purchase, the slave ran away three or four times, and he had not been found since he ran away in October, 1832. Another witness swore that five years before the sale, the slave ran away once, and was taken about two days afterwards.

MATHEWS, J., delivered the opinion of the court.

This is a redhibitory action, in which the price of a slave is claimed to be rescinded, on account of being an habitual runaway. The court below considering that the plaintiff had not supported his claim by evidence in conformity with the 2505th articles of the *La. Code*, gave judgment of non suit, from which he appealed.

The record contains the testimony of one witness, who declares that the slave in question, whilst in the possession of one of his former owners ran away twice, but does not state the length of time he was absent in either of these abscondings. Another witness prove, that he ran away once, but does not specify an absence for a period of time sufficient to satisfy the provisions of the article of the *Code*, before cited. We are of opinion that the plaintiff has not made out his case by evidences as required by law.

In an action to rescind the sale of a slave, on account of his habit of running away, proof that he ran away three times before the sale without proof of the period the slave was absent at either time, is insufficient to support the claim.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed with costs,

Seghers, for appellant.

Slidell and *Conrad*, for appellees.

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vs.
M'ADAMS.

DELARONDE vs. M'ADAMS.

APPEAL FROM THE FIRST JUDICIAL DISTRICT.

Damages will be given, when the appeal is frivolous.

This action was brought by the endorsee against the endorser of a promissory note. Protest and notice to the defendant were proved in the court below, and judgment was there rendered for the plaintiff for the amount of the note, costs of protests and legal interest from protest. The defendant appealed.

MATHEWS, J., delivered the opinion of the court.

This is a suit against the endorser of a negotiable note; protest for non-payment by the maker, and due notice to the endorser were proved on the trial in the court below, and judgment being rendered against the defendant. He appealed.

Damages will
be given when the
appeal is frivolous.

The appellee claims damages in this court on the grounds of the appeal being frivolous, and taken solely for delay; which from the evidence of the cause appears to us to be true.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs, and ten per cent. damages on its amount.

Conrad, for plaintiff and appellee.

Preston, for defendant and appellant.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Unless the ground of objection to the testimony of a witness admitted in evidence on the trial, be stated in the bill of exceptions, the Supreme Court cannot examine the objection.

It is not sufficient to object generally, that the evidence is not the best, it must be shown, either from the nature of the fact to be proved, or otherwise that there is better evidence behind in the power of the party.

Testimonial evidence to prove the age of a person is admissible, unless it is first shown that there exists a record of births, or other written evidence.

When the judgment of the inferior court was not given on the question of fact, contested by the pleadings, and this is not complained of by the parties, the Supreme Court will not examine the correctness of a decision of the judge *a quo*, rejecting the deposition of a witness.

Whenever property is acquired by the effect of obligations, those obligations except such as are created by operation of law, result from the agreement of parties, which is essentially a contract.

If the donor alone appear before the notary and sign the act of donation, it is not null for want of form.

The words "must accept" in the 1533d article of the *Louisiana Code*, are not prohibitory so as to import a nullity if contravened, nor is the pain of nullity expressly declared.

Any form of expression, which shows that the parties understood each other as to the thing given, and the conditions and charges annexed to the donation, is sufficient.

A minor above the age of puberty, may even without the concurrence of a curator, better his condition by accepting a donation.

The principles relating to a substitution, apply equally whether the substitution results from the terms used in creating the donation, or under the disguise

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of a stipulated return; and if there lurks a real substitution in the condition of return as expressed by the parties, its absolute nullity must be declared.

If while the donor stipulates a return to himself, he stipulates it in favor of another at the same time, and yet not in terms importing essentially a substitution, the stipulation of return to himself may subsist, and that part only be declared null, which contravenes the prohibition of the Code.

The plaintiff avers that in 1829, her brother William Carr Withers died, leaving his last will by which he bequeathed all his estate, real and personal, in equal portions to her, to Sarah Ann Withers, her sister, and to Margaret Delia Withers, his wife. That the testator owned a lot of ground situated in the suburb Delor of the city of New-Orleans, containing one hundred and eighty feet in front on the Mississippi river extending backward and forming the like front on New Levee-street, bounded on the upper side by a street which is the prolongation of Suzette-street, and on the lower side by the property then, or previously, belonging to the succession of Urbain Gaiennié, in front by the river and in the rear by the said New Levee-street.

She further averred that after the death of her said brother, the said Sarah Ann Withers took possession of the whole of said lot of ground, and claimed to be sole owner thereof in virtue of an act, purporting to be one of donation *inter vivos*, executed to her by their said brother, before G. R. Strigner, notary public, on the 14th day of June, 1828.

That the said act was null and void, and conveyed no title to said Sarah in and to said lot of ground because:

1. Said donation has not been duly accepted. That said Sarah was, at the time the said act was passed, a minor above the age of puberty, and should have accepted the same, by the assistance and authorisation of a curator which she did not.

2. Because the said act contains a substitution. That since the death of her said brother, said Sarah Ann Withers has executed an act of donation of one half of said lot to the said Margaret Delia, the widow of your petitioner's said

brother, who is now in possession, and claims to be the owner of said half in virtue of said act.

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She prayed that said Sarah Ann Withers, now wife of Joseph M. Kennedy, and said Kennedy her husband, and Margaret Delia, married to Sosthène Allain, and said Allain her husband be cited, that said pretended acts of donation be declared null and void, that said lot of ground be decreed to belong to the estate of said William C. Withers, and one third thereof to her, as one of his heirs.

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Mrs. Allain and her husband, excepted that their domicile was in the parish of Point Coupee, and that they could be sued only in that parish. This exception was overruled.

Mrs. Kennedy pleaded the general denial. In an amended answer she alleged, that she had been at great expense for several improvements she had made on the said tract of ground, which she had possessed and then possesses in good faith; she contends that in no case can she be dispossessed of the said premises, without those expenses being first reimbursed to her, maintaining however, that the plaintiff has no right nor title to the said tract of ground, nor to any part thereof.

The will of W. C. Withers, was in the following words: "New-Orleans, July the 16th, 1823. I, W. C. Withers, of the city of New-Orleans, do make this my olographic will as follows, to wit:

1. I do bequeath to my wife, Margaret Delia Withers, one third part of my whole estate.

2. I also bequeath to my sister Sarah Ann Withers, one third part.

3. I also bequeath to my sister, Margaret Withers, one third part of my whole estate, and finally, I do by these presents, appoint my wife, Margaret Delia Withers, and Martin Gordon, and Thomas S. Kennedy, my executors, and they are hereby empowered and authorised to make an inventory, and take full possession of all my estate, without the intervention of any court of judication in this or any other state in the union."

It was admitted, that this will had been admitted to probate, and its execution ordered.

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The act of W. C. Withers, was passed on the 14th of June, 1823, and by it he gave, granted and conveyed, "unto his said sister Sarah Ann Withers, present and accepting, and to her heirs, all that lot of ground on the batture of the suburb Delor, &c." The description corresponded to that of the lot described in the petition. "To have and to hold the said lot of ground and premises, with the appurtenances unto the said Sarah Ann Withers, her heirs and assigns, by title of donation *inter vivos*, upon this condition: that if the said Sarah Ann Withers shall die without leaving children, living at the time of her decease, that then in that case, the said lot of ground and premises shall revert to, and become the property of the said William Carr Withers, and his heirs, as if the donation had never been made; but it is hereby declared and understood, that the said lot of ground and premises, and all improvements that may be hereinafter made thereon, or any part thereof may be sold and disposed of by the said donee, Sarah Ann Withers, during her life time, with the consent and concurrence of the said William Carr Withers, the donor, and that any person or persons purchasing the same or any part or parts thereof, shall and may have and enjoy the same under perfect title, free from the condition aforesaid, on the concurrence of the said donor, William Carr Withers, being expressed or given by joining in any act or acts of sale of the same premises, or any part or parts thereof."

On the 7th of November, 1829, Mrs. Kennedy conveyed by donation, one half of the said tract of land to her sister in law, Mrs. Margaret Delia, widow of W. C. Withers.

The judge *a quo*, considering the evidence doubtful, as to the minority of Mrs. Kennedy, at the time the act of donation was passed to her by her brother, decided that if it were admitted she was not then of the age of twenty-one years, it was in his opinion unnecessary that the acceptance should be made by her curator.

Judgment having been rendered for the defendants, the plaintiff appealed.

J. Slidell, for plaintiff and appellant, contended as follows: The act of donation is null. 1, As containing a sub-

stitution reprobated by law. 2, As having been made to a minor, unassisted by her tutor. 3, Because there is no express acceptance of the donation.

If the acts contain substitution, or if all the formalities of law have not been observed, it is a nullity. The formalities required for the validity of donation *inter vivos* are *strictissime juris*, as much so as in testamentary dispositions, property can neither be acquired or disposed of gratuitously in either way, but in the forms established by the Code. See *art.* 1453. On comparison of this article with the corresponding one of the *Code Napoleon*, 892, it will be observed that the prohibitions of our law are much more rigid and comprehensive.

Whatever is done in contravention of a prohibitory law, is void, although the nullity be not formally directed. *Code, art.* 12.

The Code as regards gratuitous dispositions, makes no distinction between donation *inter vivos* or *mortis causa*; by reference to the heading of the 1st chapter of title 2, it will be seen that all the general provisions apply to donations of every kind. This court, in conformity with the jurisprudence of France and Spain, and indeed of all countries where the civil law prevails, has repeatedly decided, that in matters of testament, the minutest and formalities must be observed. *Batlemy vs. Oscar*, 12 *Martin*, 644. *Pizentot vs. Mullenshein*, 3 *Martin*, 144. *Knight vs. Smith*, 3 *Mort.* 163.

Substitutions and *fidei commissa* are prohibited. *Art.* 1507.

The right of return can be stipulated for the donor alone, *Art.* 1521.

The policy of the prohibition and the motives of the legislator, have been correctly stated by the court in the case of *Arnaud vs. Tarbe*, 4 *La. Rep.* 505, and this case presents all the evils which the law was intended to remedy. Confusion and difficulty of title, derangement of the order of succession, incapacity of alienation. To whatever period the life of the donee may be prolonged, no sale of the property can be made, for until then it cannot be ascertained whether the condition on which the property is to revert to the heirs of Withers, exist or not. See *Dalloz*, 24 vol. pages 389, 394, 417, 423,

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429, 430, 432. *Toullier, lib. 5, No. 13, 32, 35, 36, 37, 48, 50, 51. No. 287. Grenier, Traité des Donations, vol. 1, page 119, 122. See, also, Farra vs. M^c Cutcheon, 4 N. S. 50.*

The nullity affects the entire donation, the institution as well as the substitution. *Toullier, 5th vol. No. 13. 24 Dalloz, lis. Emst vs. Vander Heyden, p. 415. 24 Dalloz, lis. page 472. 24 Dalloz, lis. Dufen vs. Cottera, p. 435, Cour de Paris. 24 Dalloz, lis. Dickenn vs. Montigu, p. 436, Cour de Paris.*

The clause of return in favor of the heirs of the donor, contains a substitution prohibited by law. *24 Dalloz, lis. p. 456, 7. 24 Dalloz, lis. Bourgenjuan vs. Hassel, p. 484. Guiraud vs. Bogiers, Sirey 1827, 2 par. p. 68, 71.*

The donation is null, having been made to a minor, and not having been accepted by a tutor or curator. *Code, 1533. Tutor may accept donation, art. 349. See Dalloz vol. 10, p. 139, 140, 141. Grenier, lib. 1, p. 176, 184, No. 60, 66. Dalloz, lib. 10, p. 155. Buckier vs. Buckier, Court of Cassation, 1816. Sirey, 1830, par. 2, Mirch vs. Mirch, p. 465, 300. Sirey, 1830, par. 1, Linchet vs. Chissig, p. 8.*

Minors are not entitled to relief for want of acceptance, only have recourse against their curators. *Code, art. 1545. Delvincourt, 2 lib. p. 258.*

Donation is void, because not accepted in precise terms. *Civil Code. 1527. It may be accepted by posterior act, during life time of donor, but then he must be notified of it. Art. 1527. The mere formal phrase contained in every notarial act, "present and accepting," is not such an acceptance as the law requires. See Dalloz, lib. 10, p. 131, 134. Delvincourt, 2 lib. p. 255. Grenier, lib. 1, p. 175, No. 5.*

It is void because not registered according to law. *Code, art. 1541, 3, 4.*

The provisions of the French law on the subject of gratuitous dispositions, are much less rigorous than those of our *Code*, and give much greater latitude for the disposition of property. See *cap. 6, 2, tit. 3, L. Napoléon Code. "Des dispositions en faveur des petits enfans du donateur ou testateur ont des enfans de ses frères et sœurs;"* and others, which, in conformity with the spirit of our legislation, have not been adopted by the framers of our *Code*.

Conrad, on the same side, contended that:

The court *a qua*, erred in rejecting the dispositions of the sisters of the parties. *Phillips, on Evidence*, vol. 1, p. 37, 38, 222, 232, 233. *Starkie, on Evidence*, vol. 2, p. 746, 781, 782, *Interested Witnesses*. *Martin's Reports*, 4 N. S. 338, 539, 5 N. S. 131.

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The minority of the defendant, at the time of the execution of the act of donation, is fully made out, and the act is null for want of a proper acceptance. *La. Code*, art. 349, 1527, 1529, 1531, 1533, 2537, 1545. *Aicard, Traité des Donations*, vol. 1, p. Domat, vol. 1, tit. 10, sec. 1, p. 302. *Le Nouveau Furgole*, vol. 2, p. 611. *Merlin, Répertoire Verbis Mineur*, p. 7, et *Donation*, p. 4, sec. 4. *Grenier, Traité des Donations*, vol. 1, No. 61, p. 215 à 227. *Sirey*, vol. 12, 1 p. 400, vol. 17, 1. 114. *Favard de Langlade*, vol. 2, p. 193. *Biret, Traité des Nullités*, vol. 1, p. 246.

The article 1785, is not applicable to donations. *Grenier*, vol. 1, No. 61, p. 221. *Toullier*, vol. 5, p. 5 et 6. *Delvincourt*, vol. 2, p. 72 et 258, and compare art. 1784 of our Code with art. 1739 and 1456, also 1506 with 2026.

The act contains a substitution. *La. Code*, art. 1506, 1521. *Ricard, Traité des Donations*, 2 p. 223.

The person substituted, need not be named in the act, nor indeed be known or in existence at that time. *Ricard*, vol. 2, ch. 8, sec. 2, p. 1 et 335. *Pothier, Traité des Substitutions*, sect. 111, p. 575. *Toullier*, 5, No. 36, and the prohibition, applies to conditional substitutions. See a decision of the court of Rouen, quoted in *Domat, annoté*, 2 p. 765.

Cases similar to the one in the present act, have been decided in France, to include a donation. *Grenier, Traité des Donations*, vol. 2. *Toullier*, 5, No. 48. *Grenier, Traité des Donations*, vol. 28, p. 176 à 189. *Delvincourt, Cours du Code Civil* 2 o. 77, 278. *Merlin, Rep. Verb. Subst. Fidecom*, sec. 1, par. 14, p. 1056. *Questions de Droit, eodem verbo* sec. 4. *Sirey*, vol. 23, p. 1, 310 à 312. *Dalloz* cited by *Sirey*. 4 *La. Rep.* p. 502. *Arnaud vs. Tarbe et al.*

The donation is null for want of registering. Article 1541, 1541, 1543.

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Mazureau, Grymes and Eustis, contra.

J. and D. Seghers, on the same side, relied on the following points and authorities.

1. A donation may be accepted by a minor, without the assistance of his tutor or curator. *Non debet adversus pupillos observari quod pro ipsis excogitatum est.* 5 *Toullier*, 1st ed. p. 232, 233, Nos. 195, 196. 8 *Duranton*, p. 474, No. 437.

2. The plaintiff's allegation of the donee's minority, is unsupported by the evidence.

3. A donation cannot be said to contain a substitution, when it does not necessarily comprehend a charge to keep for and transmit to a third person. *Farrar vs. McCulcheon*, 4 *Martin's R.p. N. S.* 47. 5 *Toullier*, p. 75, Nos. 50, 51. 8 *Duranton*, p. 68, No. 70.

4. In the following sentence: "shall become the property of Withers and his heirs;" these words "and his heirs," are mere surplusage; (*sont de style.*) *Pothier*, vol. 5, p. 498. 4e. édition, *Traité des Substitutions.*

5. In order to contain a substitution, according to *Toullier*, the sentence ought to have read thus: "In case said Withers should die before his sister, then the right of reversion is hereby stipulated in favor of his, said Withers' heirs:" which has not been done. On the contrary, the following clause speaks of the consent to be given by Withers *alone*, to destroy, in favor of third persons, the effect of this right of reversion. *Merlin's Répertoire*, vol. 12, 4th ed. p. 64, ar. 2, in fine.

6. The principle concerning substitution, cannot be applied to a right of reversion. *Sirey*, vol. 23, 1st part, p. 309, *Les frères St. Arroman.*

7. The principle that a minor can always better his condition, is admitted both in French legislation and in our own; and the persons who have treated with him, cannot plead the nullity of the agreement; especially if the minor, when of age, has ratified the donation by disposing of a part of the property. *Old Code*, p. 265, art. 25. *New Code*, art. 1785. 8 *Pandectes Françaises*, p. 404, 405. *Nouveau Pothier, Donations*, vol. 2, p. 228.

8. According to the French Code, the tutor must accept with the advice of a family meeting, the donation made to

his minor, even should his ward be above the age of puberty. EASTERN DIS.
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By the *Louisiana Code*, arts. 349, 361 and 1533, the consent of the family meeting is not required, but the tutor or curator, as the case may be, is bound to accept, if in his opinion, the donation be advantageous to his ward. The reason why, in both codes, the intervention of the tutor or curator is deemed useful, though not absolutely necessary, can be very easily accounted for. It is in order, 1, To make the donation binding on the minor as if he were of age; and 2, To make the guardian answerable for the want of acceptance, should the minor, though above the age of puberty, omit to accept the donation. "Remarquez que la loi dit que la donation doit être exceptée par le tuteur. C'est une obligation qu'elle lui impose. Il suit de là, que, si la donation faite à un mineur pubère, mais non émancipé, devient caduque, faute d'acceptation, il a contre son tuteur, une action pour être indemnisé de tout le préjudice qu'il éprouve."

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"Le mineur émancipé n'a pas la même action contre son curateur, pour le défaut d'acceptation, parceque la loi ne l'en charge pas." 1 *Commaille, Traité des Donations*, No. 20. p. 33.

"Pour que la donation faite au mineur eût à son égard le même effet qu'elle aurait à l'égard du majeur, article 463, la loi a jugé utile de prescrire au tuteur de ne l'accepter que d'après une délibération du conseil de famille, pour juger si à raison des charges sous lesquelles elle serait faite, elle est ou non avantageuse au mineur. C'est pour cela que l'article 935 dit que la donation faite au mineur non émancipé devra être acceptée par son tuteur, conformément à l'article 463; ce qui veut dire que le tuteur ne pourra l'accepter qu'autant qu'il y serait autorisé par une délibération du conseil de famille, ainsi que le porte formellement cet article ainsi conçu: "La donation faite au mineur ne pourra être acceptée par le tuteur, qu'avec l'autorisation du conseil de famille. Elle aura à l'égard du mineur, le même effet qu'à l'égard du majeur."

"Mais ces précautions sont prescrites dans l'intérêt du mineur, et non dans celui du donateur, &c., &c." 8 *Duranton*, p. 475.

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9. Even supposing, for argument's sake, that the donor, in this, case, intended to make a substitution, yet it is not such a substitution as is prohibited by the code. The donor's consent was required for no other purpose than to secure third persons against the right of reversion. *La. Code, art. 1521, 1522. Le Clercq, Droit Romain, vol. 3, p. 434, 435.*

10. The donee was at liberty to alienate the property given to her. "Je donne mes biens à Paul, pour en disposer en toute propriété et comme bon lui semblera, mais à la charge, s'il n'en a point disposé avant sa mort, de rendre à mes héritiers ce qui pourra encore exister de mes biens. Cette disposition est valide, parcequ'elle ne contient point l'un des caractères essentiels des substitutions prohibées, la charge de conserver; elle ne tombe pas sous la prohibition de l'article 896." *Toullier, vol. 5, No. 38, p. 62 et 53, 1ère. éd. voyez aussi Toullier, vol. 5, p. 25, Nos. 21, 22.*

"Et pourquoi cela? pourquoi le code exige-t-il pour la frapper de nullité, qu'une disposition contienne la double condition de *conserver et de rendre*? par des motifs d'une profonde sagesse.

"Les substitutions graduelles, les substitutions avec charge de *conserver* ont été prosrites par un grand motif d'intérêt public. Mais dégagées de la charge de *conserver*, les substitutions n'ont plus aujourd'hui aucun de ces inconvénients. Elles ne retirent point les biens donnés du commerce; le fiduciaire peut les vendre ou les donner; Illes n'exposent point ses créanciers à perdre; car, à sa mort, ces biens, qu'il pouvait aliéner, deviennent le gage de ses créanciers. S'il pouvait les vendre, il pouvait à plus forte raison, les hypothéquer. Ain-i les substitutions dégagées de la charge de la charge de *conserver*, n'ont aucun des inconvénients justement reprochés aux substitutions graduelles, et qui les ont fait proscrire." *Toullier, supplément à la 1ère. édition, additions au No. 38 du tome cinquième.*

It results manifestly from the words: "as if this donation had never "been made" that the right of return was intended to be limited to the donor alone. 1 *Martin's Rep. N. S. 539, Southworth vs. Bowie. Sirey, vol. 2 23. 1 Part. p. 309, Les Frères St. Aroman.*

BULLARD, J., delivered the opinion of the court.

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On the 14th June, 1828, William C. Withers, by act before notary, made a donation to his sister Sarah Ann Withers, of a certain lot of ground. The donee is declared by the notary to have been present and accepting, and she signed the act. Both parties appear to have acted as persons of full age.

The clause of the act containing the conditions and limitations of the donation is in the following words. "To have and to hold the said lot of ground and premises with the appurtenances unto the said Sarah Ann Withers, her heirs and assigns, by title of donation *inter vivos* upon this condition, that if the said Sarah Ann Withers shall die without leaving children, or descendants of her children at the time of her decease, that then in that case, the said lot of ground and premises shall revert to and become the property of the said William C. Withers and his heirs, as if this donation had never been made, but it is hereby declared and understood, that the said lot of ground and premises, and all improvements that may be hereafter made thereon, or any part thereof, may be sold and disposed of by the said donee, S. A. Withers, during her life time, with the consent and concurrence of the said William C. Withers the donor."

Withers, the donor, died in 1829, leaving a will written and dated in 1823, by which he bequeathed the whole of his estate in equal portions to his wife, and his sisters Sarah Ann Withers and Margaret Withers.

After his death, Sarah Ann Withers made a donation of one undivided half of the lot in question, to the widow of the donor. This suit is instituted by one of the legatees of the donor against the other two, claiming her share of the lot in question, as a part of the estate bequeathed, and alleging the nullity of the donation made to Sarah Ann Withers, on two grounds. 1. Because the donation was not accepted; alleging that the donee was a minor above the age of puberty at the time the act was passed, and should have accepted

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Unless the ground of objection to the testimony of a witness admitted in evidence on the trial, be stated in the bill of exceptions, the Supreme Court cannot examine the objection.

It is not sufficient to object generally that the evidence is not the best, it must be shown either from the nature of the fact to be proved or otherwise, that there is better evidence behind in the power of the party.

Testimonial evidence to prove the age of a person is admissible, unless it is first shown that there exists a record of births or other written evidence.

Where the judgment of the inferior court was not given on the question of fact contested by the pleadings and this is not complained of by the parties the Supreme Court will not examine the correctness of a decision of the judge *a quo* rejecting the deposition of a witness.

the same with the assistance of a curator, which she did not

2. Because said act contains a substitution.

On the trial below, the defendant's counsel offered certain witnesses to prove declarations of William C. Withers, as to the age of the defendant Sarah Ann Withers. The witnesses were sworn and the plaintiff took a bill of exceptions. But it does not appear from the bill of exceptions on what specific ground the evidence was objected to. It is much too vague to enable the court to say that the judge *a quo* erred in admitting the testimony of the witnesses.

The admission of the deposition of Henry Crist was also objected to on the ground that it was not the best evidence of the facts intended to be proved thereby; and a bill of exceptions was taken to its admission by the court. It is not enough to allege generally, that the evidence is not the best; it must be shown that either from the nature of the fact to be proved or otherwise, that there is better evidence behind in the power of the party. If the fact to be proved was the age of Sarah Ann Withers, which we can ascertain only by inspecting the deposition itself, then testimonial evidence would be admissible, unless it is first shown that there exists a record of births or other written evidence. We cannot say that the court below erred in admitting the deposition.

It is not necessary to notice a third bill of exceptions in the record taken to the ruling of the District Court in rejecting the depositions of some sisters of the donee, which were objected to on the ground of their interest in the cause. The District Court did not decide on the question of fact contested by the pleadings, to wit, the minority of the donee. This is not complained of by the parties and the court is called on to review the judgment, such only as was appealed from. The admission or rejection of the evidence in question could not have any influence on the decision of the questions of law presented to this court.

I. Assuming therefore, as has been assumed in the argument on both sides, that in point of fact, Sarah Ann Withers was a minor at the time, above the age of puberty, the question presented for the consideration of the court on this

part of the case is, whether her acceptance without the assistance of a curator be sufficient in law to bind the donor, or whether her want of capacity to contract alone, renders the whole radically and absolutely null in relation to both parties.

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On this point numerous commentators, as well on the ancient jurisprudence as the modern legislation of France, have been cited. They range themselves into two distinct schools; the one contending, that in cases of donation *inter vivos*, it is essential to its existence, that both parties should be capable of contracting, and should give their assent in the forms required by law, that without it neither party is bound, and that the nullity resulting from such incapacity is absolute. The other maintaining, that minors above the age of puberty are capable of bettering their condition by every form of contract; and that he who contracts with such minor is bound, although the minor himself may avail himself of his want of capacity; in other words, that the nullity is only relative. Fortunately this court is not called on to reconsider these discrepancies, nor to declare which of these two systems is most consonant to the Code of France. It is rather our duty to inquire what is the legislative will in this state on this controverted point.

Our Code declares, *art. 1785*, that "the persons who have treated with a minor, a person interdicted, or of insane mind, or with a married woman, cannot plead the nullity of the agreement, if it is sought to be enforced by the party, when the disability shall cease, or by those who legally administer the rights of such persons during the disability."

Does this principle apply to the case before the court? It is earnestly contended that it does not, and that donations *inter vivos*, form an exception to the general rule.

Let us examine the extent of this principle so far as it can be learned by reference to the subject matter treated of in that part of the Code.

The preliminary title to the third book of the Code of the different modes of acquiring the property of things, declares "that the property of things or goods is acquired by inheri-

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Whenever property is acquired by the effect of obligations, those obligations except such as are created by operations of law, result from the agreement of parties, which is essentially a contract.

tance, either legal or testamentary; by the effect of obligations and by the operation of law." *Louisiana Code*, art. 866.

Now, whenever property is acquired by the effect of obligations, those obligations, except such as are created by operation of law, result from the agreement of parties, which is essentially a contract. And indeed it is declared, that in relation to the motive for making the contract are either gratuitous or onerous. *Louisiana Code*, 1665, 1753.

These principles are established in title four of the third book, which treats of conventional obligations.

Among the general principles relating to this subject, we find the following: "Contracts in general under whatever denomination they may or may not be included in the above division are subject to certain rules which are the subject of this title. *Art. 1770.* On the next chapter of the law title, the code proceeds to treat of the parties to a contract, and their capacity to contract, and it declares "that all cases of incapacity are subject to the following modifications and exceptions." *Louisiana Code*, art. 1776. Among those modifications and exceptions is the one first recited, *art. 1785*, that he who has treated with a person incapable of contracting, cannot plead the nullity of the agreement.

It is difficult to conceive a principle more broad, more directly applicable to all matters of convention, by which property may be acquired. And referring to the relative capacities of contracting parties. It must be decisive on this question unless there should be found something under the particular head of donations *inter vivos* which controls and limits it.

It is urged by the counsel for the appellant, that *art. 1523* of the Code, takes this case out of the general rule. "An act shall be passed before a notary and two witnesses of every donation *inter vivos*, of immovable property, of slaves or incorporeal things, such as rents, credits, rights on actions, under *pain of nullity*.

Undoubtedly an act of donation of immovables under private signature, would be null. The Code requires a higher solemnity. But here is an act passed before a notary

and two witnesses. The Code does not require both parties to give their consent by the same notarial act, on the contrary, it expressly authorises the acceptance by a subsequent act; suppose the donor alone had appeared and signed the act? would it have been null for want of form? He might have retreated before acceptance; but surely the form as to him would have been sufficient to bind him. The argument of the plaintiff's counsel supposes that you may look beyond the instrument to decide upon its form. After all it is a question of capacity. But it is contended that as the parties joined in the same act, they must signify their assent in the manner pointed out by the Code, and if they have not, the whole is null; and that a donation is binding only from the day of its being accepted in precise terms. *La. Code, art. 1527, and 1533.*

This last article declares that a minor arrived at the age of puberty *must accept* under in the authorisation or with the concurrence of his curator. But this clause is not prohibitory so as to impart a nullity, if contravened, nor is the pain of nullity expressly declared. If it had been the intention of the legislature to amend a notarial act, on the ground that one party had not given his assent in the manner directed by law, in order to make the agreement binding on him, it would have added to this article the penalty of nullity.

The acceptance to bind the donor must be made in precise terms, and binding form of expression, which shows that the parties understood each other as to the thing given, and the conditions and charges annexed to the donation, is, in our opinion, sufficient. The words "present and accepting," followed by the signature of the parties in the present case, seems to us sufficiently precise.

Such was incontestibly the Roman law on this subject. "*Obligari ex omni contractu pupillus sine tutoris auctoritate non potest. Adquirere autem sibi stipulando, et pen traditionem accipiendo, etiam sine tutoris auctoritate potest. Digest, b. 26, t. 8, l. 9. Institutes, b. 1, t. 21.*"

It was adopted in Spain, at least as early as the publica-

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If the donor alone appeared before the notary & signed the act of donation, it is not null for want of form.

The words "must accept" in article 1533 of the *Louisiana Code*, are not prohibitory so as to import a nullity if contravened, nor is the pain of nullity expressly declared.

Any form of expression which shows that the parties understood each other as to the thing given, and the conditions and charges annexed to the donation is sufficient.

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A minor above
the age of puber-
ty, may even
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condition by ac-
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tion of the Partidas. *Partida, 6. t. 16, l. 17. Gomez, varia
Res. chap. 4, de Donatione.*

It would appear, also, from some of the authorities relied on by the plaintiff, that the same principle was recognised in France, at least in the provinces governed by the written law, and previous to the ordinance of 1731.

The court is of opinion that the Louisiana Code has not abrogated this provision of the Spanish law, and that minors, above the age of puberty, and without the concurrence of a curator, may better their condition by accepting a donation.

II. The second ground of nullity alleged, is, that the act contains a substitution. It seems to be conceded in the argument, that the expressions in the above contract "to the said Sarah Ann Withers, her heirs and assigns," does not amount to a substitution. Indeed the authorities are clear on that point. *Pothier on Substitutions, sec. 2, art. 1.*

It is, however, contended, that a disguised substitution results from that clause which stipulates that the property shall revert to and become the property of the said William C. Withers, and his heirs.

This court has already decided in more than one case, that wherever it necessarily results from the language of the instrument, that a substitution was intended, its entire nullity must be pronounced. That it is of the essence of a substitution, that the original donee should be bound by the terms of the donation, to preserve the property given, for, and transmit it to another person or class of persons, which persons are appointed to take after the original donee, *ordine successivo*, and in derogation of the legal order of succession; that it is, in fact, an attempt to control the transmission of property, after the title, transferred from the donor, and to give it a direction different from what the law would give it. *5 Toulhier, No. 21, and Sey, Arnaud vs. Tarbe. 4 Martin, N. S. p. 45.*

The principles
relating to a sub-
stitution results
from the terms
used in creating
the donation, or
under the disguise
of a stipulated re-

These principles equally apply whether the substitution results from the terms used in creating the donation, or under the disguise of a stipulated return. If there lurks a real substitution in the condition of return, as expressed by the

parties, its absolute nullity must be declared. But if, on the contrary, while stipulating a return to himself, which he had a right to do, the donor has stipulated it in favor of another at the same time, and yet not as in terms importing essentially a substitution, the stipulation of return to himself may subsist, and that part only be declared null, which contravenes the prohibition of the Code. Such, according to our understanding, is the construction of the 12th article of the Code, which pronounces the nullity of what has been done in contravention of a prohibitory law. The nullity cannot be extended; on the contrary, the special prohibition of a substitution extends the nullity to all the parties concerned. The single question, therefore, is: does this clause present necessarily a substitution? To ascertain the intention of the parties, the whole instrument must be taken together. Among other things it was agreed that the donee should be always at liberty to alienate the property with the consent of the donor. How then can he be said to be bound to preserve it for his heirs? If the heirs had been designated to take in default of the donor, or perhaps if the disjunctive had been used, there would have been a second class of persons appointed to take *ordine successivo* directly from the donee, and it might have amounted to a substitution. But unless a contrary construction involves an absurdity, we are bound to adopt it. When the expression "shall revert to and become the property of the said William C. Withers, and his heirs," is coupled with what follows, "*as if this donation had never been made,*" we may well infer that the donor only intended to express the title in perpetuity, which would revert to himself and from him descend to his heirs. If he intended that the property should first return to himself, then his declaring that it should go to his heirs, would not be a charge on the donee to preserve for his heirs, because the very fact of its going to the heirs, is based on the condition that her title is divested before its return to him; and, therefore, such a declaration would amount to nothing more than a limitation of his own power to dispose of the property after its reversion to himself, which would be wholly nuga-

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turn; and if there lurks a real substitution in the condition of return as expressed by the parties, its absolute nullity must be declared.

If while the donor stipulates a return to himself, he stipulates it in favor of another at the same time, and yet not in terms importing essentially a substitution, the stipulation of return to himself may subsist, and that partially be declared null which contravenes the prohibition of the code.

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tory. The heirs in that case would take as such, and not as persons substituted to the original donee, and in virtue of this act of donation. Upon the whole, the court cannot discover in this act the essential characteristic of a substitution.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

A person who believes himself aggrieved, by the refusal of the board of directors of a bank, to permit him to become a stockholder, may, whatever be the value of the property offered, resort to an action for damages; but he cannot *appeal* from such a refusal to a court of original jurisdiction.

In such a case damages cannot be recovered for an honest error or mistake, but they may be for capricious or improper conduct of the board.

When the minds of the board of directors, to whom is submitted the validity of titles of property offered in mortgage, are not perfectly satisfied, their duty to the corporation requires them to withhold the expression of their satisfaction.

This action was brought to compel the Union Bank of Louisiana, to receive the plaintiff's subscription and mortgage for six hundred shares of their stock.

The petition avers that the plaintiff became a subscriber for this amount of the stock of the bank, and for the purpose of securing his subscription, according to the charter of the Bank, offered to mortgage to the president and directors thereof, his plantation situated in the parish of Jefferson

with the slaves thereon, and in cultivation having eight arpents front, by one hundred arpents in depth, bounded above by the land of J. B. F. Le Breton, and below by those of Robert Avart; and in pursuance of the regulations of the bank, presented the titles to said property; that under pretexts entirely unfounded in law, the president and directors of said bank refused his titles to said plantation as invalid, and rejected his subscription.

The defendants denied that the plaintiff was entitled to the stock claimed, because he had never complied with the requisitions of the charter, and the rules and regulations of the said bank. They further averred, that the titles produced by the plaintiff, were insufficient, incomplete and not valid in law; that the plaintiff could not have or maintain this action, because they, the defendants, were made by law the judges of the validity of the titles, and of the sufficiency of the property offered to secure the stock of said bank, and that as long as they acted in good faith, they were not liable to be sued.

J. J. Mercier, Esq., testified that he presented the titles to the attorney of the bank, who after examination of them, objected to them, saying that the renunciation of Mrs. Poultny, was wanting to render the titles of plaintiff regular. That witness immediately procured the renunciation of Mrs. Poultny, and presented the same with the former documents, to the attorney, who said that plaintiff's title was then complete, and requested witness to desire plaintiff to call at the bank, and answer some printed questions which were propounded to persons subscribing to the stock. Witness accordingly handed a copy of these printed interrogatories to the plaintiff.

J. B. Perrault, cashier of the Union Bank, testified that the plantation of plaintiff, mentioned in the petition, was, he believed, not appraised by the appraisers of the bank, but was approved by the board of directors. It was appraised at thirty-two thousand dollars, that is, the land alone, without the slaves. That the plaintiff has been admitted as a city subscriber, to subscribe to the capital stock of the Union Bank.

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The plaintiff had a judgment, from which the defendant appealed.

Denis, for defendants and appellants, relied on the following authorities and arguments:

1. Paillet Manuel de droit Français. Note (a) on the 411th art. of the Napoleon Code. "Un conseil de famille tenu sans citation, on sans observer les délais que la citation devait entraîner, estoalable." Ainsi jugé par la cour royale d'agen le 10 Decembre, 1806, et confirmé le 22 Juillet, 1807, par la cour de cassation qui a rejeté le pouvoir.

2. Could the judge of the Court of Probates, in and for the parish of Jefferson, authorise a notary public, residing in New-Orleans, to hold a family meeting? Yes, for this authorisation is an act of voluntary jurisdiction, not a contentious jurisdiction. See Merlin's repertoire de jurisprudence, new octavo Brussels edition, vol. 16; verbo jurisdiction gracieuse ou volontaire, page 356. "C'est en vertu de la jurisdiction volontaire, et non pas en vertu de la jurisdiction contentieuse que le magistrat procede toutes les fois qu'il prononce sur une demande qui soit sa nature, soit d'après l'état des choses, n'est pas susceptible de contradiction. Page 260, 5, on a remarqué une autre distinction, entre les actes de la jurisdiction volontaire, et les actes de la jurisdiction contentieuse, c'est que tandis que les seconds ne peuvent être faits par le juge que dans son territoire; les premiers peuvent être faits en quelque lieu que ce soit."

3. This may perhaps not be true, in this country, with regard to the judge himself, who cannot act out of his parish; but he may authorise a notary residing in another parish: car les actes de jurisdiction volontaire "peuvent être faits en quelque lieu que ce soit, page 363, 8. Il reste entre la jurisdiction volontaire, et la jurisdiction contentieuse une dernière différence, c'est que celui qui a recours a la jurisdiction volontaire, ne demande au juge que l'interposition de son autorité et que ceux que des prétentions contradictoires forcent de s'adresser aux tribunaux, leur demandent une sentence. La jurisdiction volontaire est, magis

imperii quam jurisdictionis et la contentieuse est, 'magis jurisdictionis quam imperii.'"

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4. The two first family meetings were composed of cousins. The last held in New-Orleans, was composed of uncles, who are certainly nearer relations, and who were unwilling to go in the parish of Jefferson.

5. The tutrix was not present at the family meeting, she retired after having signed. Besides, as to her presence. See 4 La. Rep. 391. *Etie's Heirs vs. Cade.*

Preston, for plaintiff and appellee, replied to Mr. Denis' arguments, as follows:

1. The judge of the parish of Jefferson could not order a notary of New-Orleans to hold the meeting. Code 305, 306, 307, acts of 1826, p. 164. He can commission any notary or justice of the peace of the state, in the words of the Code, a mere ministerial duty.

2. That the members of the family meeting, came without being summoned. The only object of the law requiring them to be summoned, was to get them to come together, "*Cessante ratione cessat lex.*" The time was given not to deliberate; they are to deliberate after they meet and see the petition.

3. That the tutrix was present at the meeting. The record does not mention that she mingled in the deliberation. She was properly present to explain any thing that might be required; to give any information to the meeting.

4. Adjudication to Soniat. Therefore, the property passed out of Beal's heirs and son, and Soniat acknowledges he bought for Walden. Code 2601.

5. Renunciation of Mrs. Poultney. 7 Toulhier. But she renounces for the express purpose of satisfying the bank, and any acceptance, and that of the bank is provable *aliunde*. Jean Joseph vs. Moreno. 2 La. Rep. 460.

6. That he did not present *tittle to slaves*. It is not required by the 8th section, because subscription may be made upon a cultivated plantation, without slaves. The legislature could not have intended to exclude white cultivators.

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It was not required by the direction of the bank, as they were bound to require by section 24th, of the charter. As they were to be satisfied, the term implies, that they should say in what the attempt to satisfy them was unsatisfactory.

7. That the property could not be sold in New-Orleans being situated in the parish of Jefferson; but see the case of *Julia Peirce*, that it may be done on the advice of a family meeting.

8. That the bank are the *sole* judges, but must act *legally* in their discretion. The decision on this point is conclusive, in the case of *The State of Louisiana vs. The Bank of Louisiana*. They must not *only* doubt; but there must be a reasonable foundation for their doubts. As a criminal judge always remarks to a jury, in answer to the defendant's counsel; *their doubts* must be reasonable in order to acquit.

MARTIN, J., delivered the opinion of the court.

The plaintiff states he subscribed for six hundred shares of the capital of the bank, and for the security thereof, he offered to mortgage, according to a provision of the charter, a plantation in the parish of Jefferson, in cultivation, with the slaves thereon, and prescribed his title thereto, to the president and directors, who under pretences, utterly unfounded, refused and rejected his subscription. He then prayed for a judgment, directing them to except and receive his subscription and mortgage.

The defendants denied the plaintiff's right to the stock claimed, as he had not complied with the requisitions of the charter, and the rules and regulations of the corporation; and the titles he produced were insufficient, incomplete, and not valid in law. They denied the plaintiff's right of action, as the charter made the directors judges of the validity of the titles, and the sufficiency of the property offered by the stockholders respectively.

There was judgment for the plaintiff, and the defendants appealed.

It appears the District Court considered any stockholder, who thought himself aggrieved by the decision of the direc-

tors, on the validity of his title, and the sufficiency of the property by him offered, to secure the portion of the capital subscribed by him, constitutionally entitled to an appeal, in cases of greater value than three hundred dollars. The last ground of defence was, therefore, overruled.

The eighth section of the charter, requires the stockholders respectively, to produce title, *to the satisfaction of the directors*. It appears to us the District Court erred, in considering the decision of the directors on this validity, and sufficiency as a judgment, from which the constitution authorises an appeal, when the shares subscribed exceed in value the sum of three hundred dollars. Whatever be the *value*, the party who thinks himself aggrieved, has the same right of action, *not of appeal*, to a court of original jurisdiction, for damages; not indeed in case of an honest error or mistake, but in that of a capricious or improper conduct. *State vs. Bank of Louisiana*, 5 Martin, N. S. 341.

This leads us to the inquiry, whether the board in the present instance, acted in such a manner as to authorise the plaintiff to seek such a remedy, in a court of justice?

The land offered to be mortgaged for the security of the plaintiff's shares, was purchased at the sale of a succession, in which minors were interested; the last bidder, after the adjudication, discovered that the members of the family meeting, which had been called to deliberate, before the sale, had not been summoned to appear before the notary, on a particular day, but had assembled without any citation, before a notary in the city of New-Orleans, while the previous proceedings, and the order for their meeting had been carried on before, and issued by the judge of an adjoining parish. On consulting counsel, the bidder was advised that his purchase might occasion him trouble, and the title he would acquire thereby, might be shaken. He declined complying with the terms of the sale, but certified he had bid for the plaintiff, who afterwards finally obtained the title, which he now complains the board, without any sound pretence, declared *unsatisfactory*, and rejected.

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A person who believes himself aggrieved, by the refusal of the board of directors of a bank, to permit him to become a stockholder, may, whatever be the value of the property offered, resort to an action for damages; but he cannot appeal from such a refusal to a court of original jurisdiction.

In such a case damages cannot be recovered for an honest error or mistake, but they may be for capricious or improper conduct of the board.

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No judicial decision, has as yet settled, whether the situation of the members of a family meeting, mentioned in the Code of Practice, be or not an essential formality; whether the meeting may take place out of the parish of the judge who orders it; whether the property of a minor, adjudicated to a bidder, who declines complying with the terms of the sale, may in the certificate of the latter, show he did bid for another person, may be legally conveyed to this person, on his compliance with the terms; and the counsel of the bank reported to the board his opinion, that he could not report the title of the plaintiff as a satisfactory one.

On these unsettled questions we ought not to express our opinion, as it might effect the rights of persons who are not before us. But we are not able to say, that the directors did not exercise a proper discretion when they declined to express their *satisfaction*, with the plaintiff's title.

When the minds of the board of directors, to whom is submitted the validity of titles of property offered in mortgage, are not perfectly satisfied, their duty to the corporation requires them to withhold the expression of their satisfaction.

Directors are not necessarily men learned in the law; when their minds are not perfectly satisfied, their duty to the corporation, is to withhold the expression of their satisfaction. In the present case, we see no ground to suspect capricious and improper views, and we think that if they have erred, the plaintiff has sustained *damnum absque injuria* damage, but no injury; the title has been fairly considered by those whom the charter designates for that purpose, and has proven and been declared *unsatisfactory*.

This view of the case renders it unnecessary to examine the other grounds of defence.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that there be judgment for the defendants, with costs in both courts.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Parol testimony is admissible in contradiction to a written instrument, to prove facts which are merely inductive to the main facts required to be proved.

This action was brought by Mrs. Badon, to recover of the brother of her deceased husband, the value of certain buildings and of their rents, and other effects of her deceased husband, of which his brother had taken and retained possession.

The plaintiff avers that there existed a community of goods between her and Raymond Badon, her husband, when the latter died in January, 1831, leaving from their marriage an only child, named Thomas Badon, who died after his father, and from whom she inherited.

That by an act of sale which was executed before a notary, on the 23d of February, 1829, Noel Badon, the brother of the plaintiff's husband, appeared to have purchased from Mr. Jean François Canonge, a parcel of land composed of three lots of ground, situated in the city of New-Orleans, suburb St. Mary, in Gravier and Common streets, and marked numbers 107, 108 and 109.

That the defendant fraudulently used all the means in his power to induce Raymond Badon, to consider the property as his own, by suffering him to take an actual possession of the same, as being the true owner thereof, to erect thereon buildings, banquettes and inclosures, for which his said brother paid with his own money about two thousand dollars, and also, with his own funds, he paid the first of the promissory notes which were given for the consideration of the said sale, amounting to five hundred and forty dollars.

That the defendant retained possession of the land, and

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of all the buildings, banquettes and inclosures, which were erected thereon by his deceased brother.

The defendant pleaded the general denial; that he had expended a large sum of money in erecting the said buildings; that he had never been put *in mora* by the plaintiff with regard to the delivery to her of said buildings, and that his brother had never paid the said note.

The notary before whom the act of sale of the land was passed, testified that he received instructions to prepare an act of sale of the lots referred to, from J. F. Canonge to Raymond Badon; that early in February, 1829, Raymond Badon called two or three times prepared to execute the act, and he thinks left the notes, but of this he is not positive; the act was not drawn up when he called; the act being prepared on 23d February, 1829. The vendor and Noel Badon met at the notary's. Raymond Badon being absent from the city, the act was drawn in favor of Raymond Badon, as vendee; the notes were signed by Noel Badon. The vendor objected to the apparent inconsistency of the sale being in favor of Raymond Badon, and the purchase notes being signed by Noel Badon; there was also a difficulty suggested as to recording the mortgage, as it appeared that Noel Badon had no power of attorney in writing from his brother. A clerk in the notary's office suggested the expedient of making the title to Noel Badon, and that he could convey to his brother, when he came to the city. Noel objected, that his notes would be given, for which he would be bound; but on being reminded of the four hundred dollars cash payment, which would so far protect him, agreed to the arrangement; accordingly, the name of Raymond was struck out of the act of sale, and that of Noel inserted, and in this form the act was executed.

Judgment was rendered for the plaintiff for two thousand four hundred and forty-six dollars. The defendant appealed.

D. Seghers, for plaintiff and appellee.

1. This is an action of debt, and oral testimony is, therefore admissible.

2. The judgment appealed from on a question of fact, prevails in the Supreme Court, unless manifestly erroneous. See the numerous decisions of the Supreme Court on this point, quoted in *Christy's Digest*, page 99.

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Canon, contra.

MATHEWS, J., delivered the opinion of the court.

In this case the widow of Raymond Badon, claims certain sums of money, which she alleges were paid by her husband, to the use and for the benefit of the defendant. She sues as surviving partner of matrimonial acquets and gains, and as heir to an only child, product of the marriage, who died since the decease of his father. The plaintiff obtained judgment in the court below, from which the defendant appealed.

The evidence of the case establishes the capacities of the petitioner, as partner in the community and heir to her child. The claim, according to the allegations of the petition, arises out of a fraudulent use of the funds of the deceased husband by the defendant, in the purchase of certain lots of ground in the faubourg St. Mary, which, although in truth and reality were purchased by Raymond Badon, his brother Noel, the defendant, contrived by unfair means to obtain the title in his own name, and used in payment of the price money belonging to his brother to the amount of nine hundred and forty dollars, and suffered the latter to expend large sums in buildings and improvements of said lots, under pretext that the title should be conveyed to him, &c.

The testimony, as it appears on the record, fully supports the judgment of the District Court. The only question in the case, is, whether it was properly admitted.

It was excepted to on the part of the defendant, as tending to prove facts contrary to the written evidence of title, which shows the property in question to belong to the defendant. It is true that many of the circumstances stated by the witnesses, are in opposition to the act of sale by which the defendant is shown to be the purchaser and consequently

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legal owner. But it must be recollected that he is charged with fraud or unfaithfulness to the interest of his brother in the transaction; a violation of the trust and confidence which had been placed in him, and this want of good faith, could probably be established by no other means except testimonial proof. The testimony was not received to invalidate the written act, and does not appear to have been used in the discussion of the cause for that purpose. The facts detailed by the witnesses, in contradiction to the written title of the defendant, are merely inductive to the main facts required to be proven, viz. the use made by Noel Badon of the funds of his brother Raymond, in making the purchase and allowing or inducing the latter to build on and improve the property as if it were his own, or under pretext that the title would be conveyed to him in due time. Under these circumstances, we are of opinion that the court below did not err in receiving the testimony.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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When a collector of the revenue has exacted higher duties than permitted by law, his payment of them after a claim made on him for the excess, does not change his liability for that excess.

If a collector of the revenue insert in the blank bond for duties, signed and left with him, a larger sum than is due the United States according to the laws of Congress, he exceeds his powers as an agent of the United States, and renders himself personally responsible, even although he acted through error.

The petition sets forth that on or about the 16th day of November, 1833, the plaintiffs imported into this district in the brig Vigilant, two hundred and seventy-five bundles of bolt iron, hammered or forged, weighing thirty-four thousand eight hundred and twenty-three pounds, which they duly entered at the custom house, securing the duties by a bond, of which the amount was as usual left blank. The defendant, collector of the port of New-Orleans, caused this blank to be filled with the sum of seven hundred eight dollars and sixty-two cents, as the amount of duties, and deposited the bond for collection in the bank of the United States. The petitioners were compelled to pay the full amount of the bond, although they had objected to its amount, and notified the defendant that they would claim from the excess thus charged. The plaintiffs also aver that there was error in the estimate of the duties, and that the whole amount thereof legally demandable, was three hundred forty-eight dollars and twenty-three cents, and that the difference, three hundred sixty dollars and thirty-nine cents, was erroneously charged and unduly paid. They accordingly prayed judgment against the defendant for this difference.

The defendant excepted that no such persons as were named in the petition, and by the name or names as therein set forth, did import any iron into the port of New-Orleans, in the manner and form stated; that in calculating said duties, he acted as collector of the district of Mississippi, and as an officer and agent of the government of the United States; and in that capacity, received and paid over said duties to the United States, and, that therefore, he is not responsible, as alleged in the petition.

Should the exceptions be overruled, he answered that the said duties were correctly calculated according to the acts of Congress. He also pleaded the general denial.

The judge *a quo* sustained the exceptions, and dismissed the petition.

The plaintiffs appealed.

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Strawbridge, for plaintiffs and appellants, made the following points:

1. To the first and third exceptions, it is sufficient to say they are mere denials of matters of fact, charged in the petition, going to the merits. Unless the plaintiffs show that they did import, and unless they show the duties to have been overcharged, their suit fails; beyond this, it might be said that these exceptions, if they can be considered such, depend on proof. If the judge decided on them, he decided without that proof. To the second exception, I answer by referring to two cases recently decided in New York, where, to a similar claim, the same exception was pleaded, and overruled. Without looking to authorities, it seems to me the learned judges who decided those causes, might have found better reasons for their decisions, in the first principles of the law of agency. There are three elementary propositions, too plain to need illustration. 1. Where an agent, in doing a lawful act, keeps within the limits of his power, the principal is bound, the agent is not responsible. 2. Where the agent surpasses his authority, he is personally responsible, but his principal is not. 3. Where the act is illegal, though within the power given, both are bound.

2. The authority of the collector is to exact duties on merchandise imported, in conformity with the revenue laws. He has no more right, by virtue of his office, to exact one dollar more than the law authorises, than he has to do it with a pistol in his hand; he exceeds his authority. The act is illegal. For the purpose of this argument, the allegation of the petition is to be taken as true, that a greater amount was taxed than the law authorised, and it will be incumbent on the counsel to show, that the collector's authority extends to taking higher duties than the revenue laws have fixed, and that such act is legal, or they must admit his personal responsibility for the act. If this defence be good, there is no redress for such matters. I cannot sue the government; the collector's agency shields him; my bond signed in blank, is filled up as they please at the custom house; if not paid in Bank, all future credits are denied me; if paid, I

cannot recover it back. Moreover, there remains the allegation that the defendant was notified that this excess would be reclaimed.

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Carleton and Lockett, for the defendant and appellee, contended that:

1. The court below did not err in dismissing the plaintiff's petition, because the defendant acted as the agent of the United States, in receiving the duties alleged to have been paid by the petitioners. We shall notice no other point in the cause except this, as it was on that the suit was dismissed. In order to show, conclusively, that the defendant is *not* personally liable, we refer the court to the form of the bond. This bond commences, "Know all men by these presents, that we, Gordon, Forstall & Co., are held and firmly bound to the *United States of America*," and then goes on to say the condition is to pay "*to the collector of the customs for the time being*." Now, in *whose* favor is this obligation contracted? surely *not* in favor of the defendant. If suit had been brought, in *whose* name would it have been instituted? Why, in the name of the *United States of America*, *not Martin Gordon*. If the bond had *not* been paid, who would have lost the amount? The United States, *not* Martin Gordon. See form of bond, and *Ingersoll's Abridgment*, p. 220.

2. The plaintiff relies upon two decisions, which he says were made in New York, and are reported in the newspapers. We think little weight ought to be attached to reports of editors of newspapers, of cases they may hear decided, and the more especially, as the point now before this court is new, and of immense importance, which may involve the collector of this port in responsibilities to the amount of millions of dollars.

3. The cases in those papers differ essentially from this, because there the plaintiffs *objected* to giving the bond at the time they signed it, and notified the collector that they intended to reclaim it, and the collector paid the duties to the

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government *after* institution of suit, and *after* this notification. Here, notification is *alleged*, but *was not proved*. Had Martin Gordon paid over these duties *after* the commencement of this suit, and *after* due notification on the part of the plaintiffs, he would come within the decisions in the newspapers. Here the plaintiffs allege that the bond was left blank as to the amount, and that they "objected to the amount," but, when did they object? If the plaintiffs wish to have the benefit of these newspaper cases, it is very material to say when. Besides, they say their vessel entered on the 16th of November, 1832, and they wait till the 28th of October, 1833, before they do any thing! Why was not suit brought instantly on discovering the mistake, if any, and not wait nearly a year, when, in the mean time, the collector had paid, and was bound by his duty to pay, into the United States treasury the duties? See *Ingersoll's Abridgment*, p.

Therefore, this case does not come within the newspaper decisions in one material point, as to the facts which rendered the collectors liable. But it is believed that the newspaper cases are not and ought not to be considered as being correct. An agent, where he *discloses* the name of his principal, and the *nature and extent* of his powers, *never* can be made responsible personally for any act or contract done as such. 2 vol. *Kent. Com.* p. 629, 630, 631, and 632. (Ed. 1832.) 4 *La. Rep.* p. 234 to 236. *Hyde vs. Wolf.* *La. Rep.* vol. 5, p. 333. *Boimare, vs. Toby.* 3 *Martin's Rep., O. S.*, p. 642, and 644. *La. Code*, arts. 2981 and 2982. But Martin Gordon can hardly be considered even as agent, because the bond was to pay directly to the United States, and *he merely to receive* the money. Now can a man be made responsible, *personally*, for *merely receiving* the amount of an obligation, in favor of another. The fact of the defendant being collector, and consequently *agent* of the government, is alleged in the petition.

4. As to the second, of what the plaintiffs call elementary principles, or propositions, we differ. If an agent *acts as agent*, and *shows his powers*, in dealing with another person, *he will not* be responsible personally, for the simple reason,

that the party with whom the agent contracts, upon seeing the powers, ought to know, and be as good a judge as the agent, of the extent of those powers. *See books before cited.*

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5. As to the third, we do not exactly comprehend how one can *legally* authorise an agent to do an *illegal act*. It would then be an offence, if the agent commits an illegal act; this is not the case before the court. *See case in one of Contracts made in favor of the United States.*

MARTIN, J., delivered the opinion of the court.

The plaintiff's state they imported a quantity of iron, and for the purpose of obtaining a permit for landing the same, subscribed a blank, according to the usage of the custom house, and the defendant, who is collector of the revenue, filled the blank left for the insertion of the amount of the duties, for a larger sum than that which was by law chargeable therefor, and the bond being lodged for collection in the branch bank of the United States; the defendants, in order to avoid the inconvenience of losing for a while the facility of bonding future duties, took up their bonds, after having objected to the amount claimed, and after having notified the defendant of their intention of claiming the excess of duty from him personally.

The defendant filed the following exceptions to the petition.

I. That no person or persons bearing the name or names the plaintiffs respectively sue upon, made an importation of iron, as alleged.

II. That the defendant acted as collector of the revenue, and an officer of the United States, and therefore, is not responsible personally, for money received for and paid to them.

These exceptions were sustained, and the petition dismissed, whereupon the plaintiff appealed.

Their counsel in this court, has contended that the first exception was merely a plea on the merits, as if the plaintiffs

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did make the alleged importation, they cannot support their cause.

The counsel has further relied, as to the other exception on the decision of the Supreme Court of the state of New York, in the cases of *Lefon vs. Swartout*, and *Grinnel et al. vs. The Same*, which he has read from two newspapers.

On the part of the defendant, it has been contended that little weight ought to be given to newspaper reports, and he has endeavored to distinguish the present case from those in New York. In these the defendants objected to the sum claimed, before they signed the bonds, and the collector parted with the money, after they had been notified of the intention to claim the excess, and after the institution of the suit, while in the present case, the notification is indeed alleged, but not proved, that the suit was not instituted till a very long time after the payment of the money by the collector, to the proper department. It has been further urged, that the agent who discloses the name of his principals does not bind himself personally by that contract. *2 Kent's Com.* 629, 632. *La. Code* 981, 2. Lastly, it has been held, that one who receives a sum, due to a third party, and pays it over, incurs no personal responsibility.

It has appeared to us, the present case cannot be materially distinguished from those in New York. It is true, in the present, no objection was made before the signature of the bond; because no objection had then occurred; the objection could not be made till the plaintiffs had knowledge of the illegal charge, and the objection was made before the plaintiffs took up their bond, and the notification of their intention to claim the excess from the defendant, personally, was made, or at least is alleged to have been then made. It is true, in the New York cases, the collector paid the money over before the institution of the suit, while the defendant did so, long before the commencement of the present suit. The party claiming the money, before its being paid over, may avail himself of the institution of the suit, because it is evidence of the knowledge he has given of his claim; so he may of any other mode use to afford that knowledge.

In the present case, the payment made by the defendant, cannot dissolve his obligation to the plaintiffs, if by his previous conduct he has incurred any.

It is, however, contended he did not incur any, by the overcharge, because he disclosed the name of his principal, as was known to the plaintiffs as a mere agent. He was indeed the agent of the United States, in procuring, according to the usage of the custom house, the signature of a blank bond, and in doing so, he acted within his powers; this authority was to fill the blank left for the amount of duties to be paid by the insertion of a sum equal to the claim of the United States, according to the law of Congress; if he inserted a larger sum, he exceeded that authority, and nothing is clearer, than that the agent who exceeds his powers, renders himself personally responsible.

In passing upon exceptions, pending on the dismissal of an action, without a trial, the truth of the allegations of the petition, must be assumed, because none of them are denied. If, therefore, the plaintiffs were compelled by the illegal act of the defendant, to pay higher duties on their importation, than were imposed by law, he did him an injury to the amount of the excess, even although he did so through error. Admitting that if before he discovered his error, his payment of the whole amount of the sum they paid, could have protected him if he did so, after his attention was drawn to his mistake, and after he had received notice of the plaintiffs' intention to claim from him personally the excess, he cannot avail himself of his payment.

The judge *a quo*, in our opinion, erred in sustaining the exceptions.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the exceptions overruled, and the case remanded for further proceedings, according to law, the defendants paying costs in this court.

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If a collector of the revenue insert in the blank bond for duties, signed and left with him, a larger sum than is due the United States, according to the laws of Congress, he exceeds his powers as agent of the United States, and renders himself personally responsible, even although he acted through error.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The discontinuance of a suit is not conclusive evidence of a want of a cause of action, and that a sequestration was wrongfully sued out, particularly as relates to the surety in the bond. In a suit on the bond after a discontinuance, evidence may be given, that some cause of action existed at least in mitigation of damages.

Grounds of suspicion, merely, and those extremely slight, do not authorise resort to so severe a mode of proceeding as a sequestration, nor ought they to have much influence in varying the standard by which damages should be awarded.

A party against whose property a writ of sequestration is wrongfully sued out, ought to be placed as nearly as possible, in the situation in which he would have been had the writ not issued. If the party suing out the writ, fail to show not merely a real cause of action, but a ground of suspicion, which would justify a man in the sober pursuit of his rights, uninfluenced by momentary pique, to resort to a remedy intended only for extreme cases, he will subject himself to pay damages according to a liberal standard though not vindictive.

A verdict not followed by a judgment has no force for any purpose.

The plaintiffs claim damages to the amount of nine thousand dollars, on account of one of the defendants having wrongfully sued out a writ of sequestration against their property.

The plaintiffs aver that on the first day of December, 1329, Jules Le Blanc commenced a suit against them, alleging that they claimed and had taken possession of one hundred and eighty-nine thousand seven hundred and thirty staves, the property of Jules Le Blanc, as he pretended, and which he stated to be of the value of six thousand dollars. Jules Le Blanc prayed that the said staves which were in their possession, should be sequestered and held by

the sheriff, which was accordingly done, and the same were immediately taken out of their possession, and have ever since been held by the sheriff.

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At the time of issuing said sequestration, Le Blanc and Charles Lesseps executed their bond, by which they acknowledged themselves held and firmly bound in the sum of nine thousand dollars, conditioned "that if the said Jules Le Blanc should prosecute his said sequestration with effect, or should pay any such damages as said Stetson & Avery may sustain, in case this sequestration should have been wrongfully obtained; then the obligation to be null, or else to remain in full force and virtue."

They further state, that Le Blanc has not prosecuted said sequestration with effect; that on the 21st day of May, he discontinued his said suit; that said sequestration was "wrongfully obtained;" that said staves were their property, and never did belong to said Le Blanc.

The defendants admit the institution of the suit, and that sequestration was made of certain staves, as appears from the record of the case of *J. Le Blanc vs. Stetson & Avery*. They aver that no damage has been sustained by the plaintiffs, in manner and form as is in their petition set forth, and that the present defendants had reasonable grounds for the institution of said suit and said sequestration. They deny that said staves belonged or belongs to the plaintiffs. They added the general denial.

Before instituting the suit, Stetson & Avery offered to surrender the staves on being paid the amount of the bond, viz: nine thousand dollars, or to dispose of them as Le Blanc should direct.

After several continuances, the cause was tried, and a verdict found for the plaintiffs for two thousand dollars, which was set aside as for excessive damages. The trial by jury was then waived, and the case submitted to the court.

The record of the former suit was given in evidence. The petition in that suit averred that Le Blanc was the owner of two hundred and ninety-three thousand staves, deposited on

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the bank of the Mississippi, opposite to the city, on a lot of ground hired for that purpose; that in August, 1829, one hundred eighty-nine thousand seven hundred and thirty of said staves were taken away by persons unknown to the petitioner, and without authority, and piled up behind the powder magazine; that said staves are claimed by Stetson & Avery, but that they have no right or title to the possession or property of the same; that the petitioner apprehends they will be removed out of the jurisdiction of the court, and prays sequestration, which was granted on the usual bond.

Stetson & Avery filed an answer, and pleaded in reconviction; but Le Blanc discontinued the suit on the 21st May, 1830, the day for which it was fixed for trial.

Mathews, testified for the defendant, that in the month of May, he was employed by Le Blanc in taking staves across the river, to Bonny's lot; he saw a mulatto man named Joe, transporting two flatboats of pipe staves from the landing opposite the lot of Bonny, to the levée of Mr. Mossy, opposite the powder magazine. Witness inquired of said Joe the reason why he was transporting Mr. Le Blanc's staves, when he told witness that Mr. Le Blanc had taken a lot in the rear of the powder magazine, and that he was taking the staves there. Bonny's lot is from five to six hundred yards below the powder magazine. On a deficiency in Le Blanc's staves being discovered, witness mentioned this circumstance; it was three to four months after it happened. Witness made inquiry for Joe; he was said to be dead. Joe had been employed by Le Blanc to discharge several boat loads of staves for Mr. Le Blanc, on Bonny's lot, and also to purchase staves for him. He appeared to have charge of the staves in said lot. Witness informed Mr. Le Blanc of the circumstance, on his return from the north. On his cross examination, witness says he cannot swear positively that the boat load of staves removed by Joe, belonged to Le Blanc; he did not see them bought; he believes that no other boats loaded with staves, than those belonging to Mr. Le Blanc, lay opposite the lot of Mr. Bonny. He saw the

staves laying on the levée, after being landed from said boats, and saw part of them carried into a lot in the rear of the magazine. Witness was principally employed at the stave yard hired by Mr. Le Blanc, belonging to Mr. Layton.

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Ashuret, testified for the defendant, that he lives on the opposite side of the river, near Bonny's lot; that in 1829, the staves were piled so high that Bonny objected to it, lest they should be thrown down; that at this time, two flatboats, with staves, were laying along side of the levee; part were landed. Bonny objected to any more being landed, and the persons employed by Le Blanc desisted; the boat lay there several days. One morning, very early, witness observed a man transporting the flatboat with a full load of staves, and the other, two thirds full, up the river, and saw him taking said boats to the landing of Mossy; that the staves in said two boats were landed on the levée, and witness afterwards saw them carried, by persons employed for that purpose, into the lot in the rear of the powder magazine, and piled up there.

Judgment was rendered by the judge *a quo* in favor of the plaintiffs, for one thousand three hundred forty-nine dollars and fifty cents.

The defendants appealed.

The appellees denied error in the judgment of the inferior court, to the prejudice of the appellants, but averred that the sum adjudged in their favor should be increased to two thousand dollars.

BULLARD, J., delivered the opinion of the court.

The defendants are sued as principal and security in a sequestration bond given to the plaintiff in a former suit of the present defendant Le Blanc against the plaintiffs, in which a quantity of staves were sequestered as the property of Le Blanc, which he charged the present plaintiffs with having taken possession of, and which he claimed as his property. The staves remained sequestered about six months, and the suit was discontinued by the plaintiff. The District Court assessed the damages sustained by them at

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one thousand three hundred and forty-nine dollars and fifty cents and the defendants appealed.

It is true as contended by the counsel of the appellant, that the discontinuance of the suit is not conclusive evidence of a want of cause of action, and that the sequestration was wrongfully sued out. This is particularly true as relates to the security. The fact that the plaintiffs had some cause of action may well be given in evidence, at least in mitigation of damages. *Martin's Rep.* 6 N. S. 338. 8 N. S. 481.

But we think, on a careful examination of the evidence, that the defendant has failed in proving that he had any cause of action against the present plaintiffs whatever. In his answer in this case he does not pretend to have had a real cause of action. He says, that he had reasonable grounds for instituting the suit, and he denies that the staves which he then claimed as his, were the property of the plaintiffs, but he does not pretend that any of them were his. In the former suit he set up title to the staves, and obtained the sequestration on the ground that they had been taken possession of by the plaintiffs, and that there was danger of their being removed beyond the jurisdiction of the court.

With a view of showing probable grounds for resorting to a harsh remedy, by which the real owner was kept out of the use of his property for six months, he has proved by one of his witnesses, that about seven months before the sequestration was sued out, he the witness saw a mulatto man named Joc, who had been employed by Le Blanc to discharge staves from flatboats, transporting two boat loads from the landing opposite the lot of Mr. Bonny, where Le Blanc kept his staves, to the levée opposite the powder magazine, back of which the plaintiffs kept theirs. That the mulatto told him Mr. Le Blanc had taken a lot back of the powder magazine, and that he was taking the staves there. This witness was himself at that time in the employment of Le Blanc; but so little impression does this circumstance appear to have made on his mind, that he did not communicate the fact until several months afterwards. He saw the staves afterwards lying on the levee; that he has

made inquiries for Joe, and is informed that he is dead. He does not even know that the boat loads of staves that Joe was moving, belonged to the defendant. He saw a part of the staves carried to the lot back of the powder magazine. Another witness swears that two boat loads were taken from Bouny's landing; were discharged opposite the magazine, where the staves remained about ten days on the Levee, and were finally taken back of the magazine. But he does not pretend to know that Le Blanc owned the staves, nor does he say that he notified Mr. Le Blanc of the fact.

The authorities cited by the defendant's counsel relate principally to cases of malicious prosecution. And in such cases it is enough to prove probable cause for instituting the prosecution. Damages in cases of that kind are awarded for wanton injury inflicted on the character and feelings of the person unjustly subjected to prosecution, and it is the policy of the law not to discourage prosecution in which the public good is concerned, where there is probable cause for proceeding. Grounds of suspicion merely and those extremely slight do not, in our opinion, authorise a resort to so severe a mode of proceeding as a sequestration, nor ought they to have much influence in varying the standard by which damages should be awarded. The plaintiffs were deprived of the faculty of profiting by the fluctuations of the market. Their property was becoming deteriorated by decay; they were subject to the expense and trouble of defending the suit, and the evidence shows a fall of price in the mean time. But it is contended that the District Court was bound to estimate the loss sustained by the plaintiffs according to the prices in France, because they had alleged in their petition, that they intended to ship the staves to France for sale. Nothing is said in the petition about the market of France. It is true they allege that they have sustained damage by the wrongful suing out of the sequestration by being prevented from shipping and selling their staves. They seem to have thought that they were entitled to consequential damages. In our opinion the true standard is the probable loss sustained here in consequence

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Grounds of suspicion merely and those extremely slight, do not authorise a resort to so severe a mode of proceeding as sequestration, nor ought they to have much influence in varying the standard by which damages should be awarded.

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A party against whose property a writ of sequestration is wrongfully sued out ought to be placed as nearly as possible in the situation in which he would have been had the writ not issued. If the party suing out the writ fail to show not merely no real cause of action, but no ground of suspicion which would justify a man in the sober pursuit of his rights, uninfluenced by momentary pique to resort to a remedy intended only for extreme cases, he will subject himself to pay damages according to a liberal standard though not vindictive.

A verdict not followed by a judgment has no force for any purpose.

of being deprived of the free disposal of their own property, together with the other elements above mentioned. The plaintiffs ought to be placed as nearly as possible in the situation they would have been if the sequestration had never issued. Having failed to show, not merely any real cause of action, but any grounds of suspicion which would justify a man in the sober pursuit of his rights, and not influenced by momentary pique, to resort to a remedy intended only for extreme cases, the defendant has subjected himself to pay damages according to a liberal standard though not vindictive. We are not enabled to say from the evidence, that the sum awarded by the District Court is excessive.

The appellee in his answer, asks that the judgment may be reversed and higher damages awarded; and he refers us to a verdict on a former trial for two thousand dollars, not as a standard at all binding on the court, but as the opinion of twelve men on the question of damages, although set aside by the court as excessive. We cannot look at the verdict for any purpose. If it is not a verdict followed by a judgment it is nothing, for it cannot be considered as evidence in the cause.

It is therefore ordered, adjudged, and decreed by the court, that the judgment of the District Court be affirmed with costs.

Slidell, for plaintiffs and appellees.

Carleton and Lockett, for defendants and appellants.

COMPTON vs. WOOLFOLK.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

In a redhibitory action where the plaintiff in his petition, in order to prove the warrantv of the slave, relies on a sale passed on a particular day, and identifies it by referring to it as annexed to an answer in a particular case

in the same court, *add* that by the introduction in evidence of the act of sale, the defendant could not complain of surprise, although by the petition he alleges the payment to have been made by an endorsed note, and the act of sale shows it to have been made in cash.

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In such a case the judgment rendered could be pleaded in bar to a subsequent action for the same cause.

This was a redhibitory action to recover the value of a slave who had died soon after the sale. The petition states that Peleg B. Phelps, executed to the petitioner his promissory note for the sum of six hundred dollars, payable six months after date, which promissory note, afterwards endorsed to the petitioner, was given to John Woolfolk, on the same day for a negro woman named Fanny, aged twenty years and her child, to be conveyed by the petitioner to Richard J. Woolfolk, the broker of the said John Woolfolk. That the said negro woman was warranted free from the vices and maladies prescribed by law, as will fully appear by reference to the bill of sale of said negro, passed on the same day of the 13th December, 1831, and appended to the answer of the petitioner and Peleg B. Phelps to the petition of Mathew D. Cooper against them, in this court, in the suit of No. of the court docket. That the said negro woman was, at the time of the passage of the bill of sale, afflicted with a disease of which she afterwards died. That though the said negro woman was passed to the petitioner by Richard J. Woolfolk, the said John Woolfolk was the owner of said negress, received the money which was paid for her, warranted her free from all the redhibitory defects and diseases mentioned by law.

To these allegations the general issue was pleaded. At the trial the plaintiff took bills of exceptions to the following decisions of the judge *a quo*. The court refused to admit under the pleadings, an act of sale of the negro, because it stated the sale to have been made for cash. It then refused to receive parol testimony of the sale. It also refused the plaintiff a non-suit for which he applied, and to which the defendant's counsel objected.

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It was proved by a physician that the negro died subsequent to the time of the alleged sale, and of a disease with which she had a long time been afflicted.

The defendant had a verdict and judgment, and on the plaintiff's application, a new trial was granted.

On the second trial the same document was offered; the same objection to it taken, and the same decision given, to which a second bill of exceptions was taken. The defendant again had a verdict and judgment, and his opponent appealed.

McCaleb and *Gray*, for plaintiff and appellant, relied on the following points and authorities.

1. The bill of sale ought to have been permitted to have gone to the jury, and the bill of exceptions thereupon is correct and ought to be sustained, because the Supreme Court has decided in 6 *Mart. N. S.* 127 and 7 *Mart. N. S.* 228, 6, that there can be no variation between the instrument declared on the petition when the former is made part of the latter by express declaration or by explicit reference. It is true that the bill of sale it not annexed to the petition, and it was only because it was *annexed* to the answer of the plaintiff in this case to an action brought against him by another person, Woolfolk, upon the promissory note alluded to in the petition as the purchase money of the slaves in controversy, and consequently is not made part of the petition by *express declaration*, but it is referred to explicitly and pointedly as the foundation of the present action, and moreover as annexed to the answer of the plaintiff in the case above alluded to. The court is asked to consider it for greater accuracy, and as containing a more full and ample explanation of some facts stated in the petition. Thus the case is brought under the reasons laid down by the court in the case of *Ditto vs. Barton*, 6 *N. S.* 128, as governing all cases where the point of variation between petition and instrument sued upon, arises "When there can be no surprise, and when the *res judicata* may be pleaded to another action on the same allegation, the defendant says

the court can have no ground to complain of a variation." EASTERN DIS. March, 1834.
 Here there could have been no surprise, because the defendant and court is expressly referred to bill of sale, and *res judicata* could certainly be pleaded to another action on the bill of sale, because we should be *estopped* by our petition by denying that the cause of action was the same. As to *res judicata*, see 11 Mar. 481. 9 Mar. 727.

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2. Non-suit is the right of the plaintiff any time before verdict. 8 Mart. N. S. 115. *Stevens on Pleading*, note 'm.' 312. 3 Black. Com. 376. 12 Mar. 31. *Id.* 7 Mar. 567.

Hennen contra.

BULLARD, J., delivered the opinion of the court.

This case comes before us on a bill of exceptions. The plaintiff in his petition represents that a certain note drawn by one Phelps and endorsed to the plaintiff, by him was given in payment for a slave which was to be conveyed and was conveyed on a particular day to him by the agent of the defendant. The act of sale is referred to in the petition by its date, the name of the slave sold, the name of the vendors, and the price, and as annexed to the answer in another case in the same court. The object of the suit is to recover back the price on the ground of a redhibitory vice. On the trial the plaintiff offered in evidence the act of sale. It was objected to on the ground "that the bill of sale averring the sale to have been made for ready money, and the petition for a promissory note, there was a contradiction between the two, and the bill of sale could not be introduced." To this objection the court assented, and the bill of exceptions was tendered. This bill of exceptions was taken on the first trial, but the court having granted a new trial, the same evidence was offered on the second trial, and the same objection made and sustained. A new bill of exceptions was signed, in which the judge adds the further ground, "that there must be some point to the latitude allowed in such cases." And that on the for-

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In a redhibitory action when the plaintiff in his petition in order to prove the warranty of the slave, relies on a sale passed on a particular day and identified it by referring to it as annexed to an answer in a particular case in the same court, *held* that by the introduction in evidence of the act of sale, the defendant could not complain of surprise, although by the petition he alleges the payment to have been made by an endorsed note, and the act of sale shows it to have been made in cash.

In such a case the judgment rendered could be pleaded in bar to a subsequent action for the same cause.

mer trial, the court intimated that the plaintiff ought to amend his petition in such manner as to correspond with his evidence. There was a verdict and judgment against the plaintiff and he appealed.

In the case of *Ditto vs. Barton*, this court held that when there could be no surprise and when *res judicata*, may be pleaded to another action on the same allegation, the defendant could have no ground to complain of a variance. 6 *Martin N. S.* 128.

In the case before the court the party could not reasonably complain of surprise. He was informed by the petition, that the plaintiff to prove the warranty of the slave, relied on a sale passed on a particular day and identified it by referring to it as annexed to an answer in a particular case in the same court. He was distinctly notified that the plaintiff held him liable in warranty of the slave Fanny, according to the deed of the 13th of December, 1831.

If he could have no reason to complain of surprise, had he any to apprehend that the judgment to be rendered in this case, would not be a bar to any subsequent action for the same cause? The suit was instituted to annul the sale of the slave Fanny, sold on the 13th December, 1831, and warranted free from redhibitory vices, and to recover back the price paid. There appears to be no dispute in relation to the price. It seems that the vendor acknowledged in the deed, that the price had been paid in ready money, and the plaintiff alleges that it had been paid before the conveyance in an endorsed note. But the gist of the action was the sale, the warranty, and the redhibitory vice of the slave. If the judgment rendered below were to stand, we should not hesitate to say, that it would be a complete bar to a subsequent action for the same cause.

In the case of *Laferrière vs. Sanglier*, which was one of redhibition, the deed expressed the price to be one thousand five hundred dollars in hand, paid in *his note* of hand; evidence was admitted to prove that two notes were given of seven hundred and fifty dollars each. This was held not to be such a variance as to exclude either the notes or the

deed. In that case the redhibition was set up in defence of suits brought on the notes. 12 *Martin*, 399.

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We consider the rule adopted in the case, first alluded to a safe and reasonable one, and sufficiently rigid to guard parties against surprise, and to protect them against being again sued for the same thing. In our opinion therefore, the deed ought to have gone to the jury.

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It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided, and reversed, and that the case be remanded to the District Court with directions to admit the deed in evidence, notwithstanding the objection mentioned in the bill of exceptions, and that the appellee pay the costs of the appeal.

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APPEAL FROM THE COURT OF THE FOURTH DISTRICT.

If a mortgage exists on property in the hands of a third possessor, the property can be legally sold under it only by pursuing the hypothecary action.

The sale of property by order of the Court of Probates, extinguishes all mortgages created by the deceased.

It seems that the article 2290 of the *Louisiana Code*, applies to cases in which the possessor was from the first a wrong doer and an usurper, acting with a knowledge of his want of faith. It cannot be said that the purchaser at the marshal's sale participated with the latter in the original trespass, by seizing and selling property without authority.

The possessor who was originally in good faith, is not liable for the destruction of the thing without his fraud or fault.

EASTERN DIS. Such a possessor is responsible for the fruits and revenues of the thing from
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William Joyce, in February, 1823, purchased at the probate sale of the succession of Jeanne Delaterre, ordered by the parish judge of the parish of West Baton-Rouge, a negro man slave named Cudjo or Codio, for five hundred and twenty dollars. It is alleged that he possessed the slave until the month of January, 1829, when the slave came into the possession of Benjamin Poydras de la Lande, who has illegally held him in possession ever since, and now sets up claim and title to the same. The plaintiff claims damages for the detention of the slave, to the amount of one hundred dollars per year, since he came into the possession of the defendant.

The defendant denies that the plaintiff was *bona fide* the owner of the negro at the inception of the present suit. He avers that he is the lawful and *bona fide* owner and possessor of the negro, having bought the same on the 26th day of January, 1829, for the sum of two hundred and five dollars, at the public sale made on that day by the deputy marshal of the United States' Court for the Eastern District of Louisiana, by virtue of a writ of *fieri facias*, issued from that court, at the suit of the *Heirs of Durand vs. the Heirs of Delaterre*, that ever since he has peaceably and *bona fide* possessed the said negro. He further avers, that the said negro has been seized in the possession of Mr. A. Leblanc, by the deputy marshal aforesaid, in due course of law, as alleged by the plaintiff himself, before this court, in a suit, wherein he was the plaintiff, and the heirs of Delaterre were the defendants, for the same cause of action; and that the plaintiff suffered the said negro to be advertised for sale and sold, without in any manner opposing the sale, and thereby suffered the public to remain ignorant of any claim which the plaintiff might have upon said negro.

He further alleges, that he having bought the said negro, and all the rights which the heirs of Delaterre had on the 21st day of November, 1828, or at any time since, in the afore-

said Cudjo, and a final judgment having been rendered in favor of the heirs of Delaterre against the plaintiffs for the same cause of action, this forms *res judicata* with reference to the present suit. He denies that he is bound to pay any rent or profit for the services of said negro, because he bought and possessed him in good faith, and with a just title, and was not put in *morâ*.

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In reply to an interrogatory propounded to him by the defendant, the plaintiff stated that he had considered himself as the *bona fide* owner of the slave, from the day of the adjudication at the probate sale: and that he had paid the price at which the slave was then adjudicated to him.

It was proved that the slave in dispute had died of cholera, after the institution of the suit, and before the trial.

Judgment was rendered against the plaintiff, and he appealed.

Cooley, for plaintiff and appellant, relied on the following points and authorities:

The proprietor has the right of claiming his property in whatever hands he may find it. *Toullier*, vol. 11, p. 27, No. 19. *Domat. Des Quasi-contracts*, lib. 2, tit. 7, sec. 1, art. 8.

Where the title emanates from the same source, it is sufficient for the plaintiff to prove title and possession, anterior to that of the defendant. *Pothier, de la Propriété*, part 2, ch. 1, art. 3, No. 326.

The plaintiff's title is proved by his answer on oath to the defendant's interrogatory, unless the contrary is proved, &c. *Code of Practice*, 354.

The defendant is in bad faith from judicial demand, and must pay for the hire of the slave, at least from that time; and in case of death, must pay his value. *Louisiana Code*, art. 493, 494 and 495. The old Code had changed the rule, and *Packwood vs. Richardson*, was decided on that Code; but the *Louisiana Code*, has restored the old rule, which is clear. See *Dig. lib. 5, l. 25, sec. 7*. "*Non tantum litis contestatio, sed et sola petitio, facit malæ fidei possessorum.*" *De hereditatis*

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petitioni. Febrero, part 1, ch. 7, sec. 2, No. 85. Partidas, part 3, tit. 28, l. 39. Domat, lib. 3. tit. 5, sec. 3 and 17. Pothier, de la Propriété. No. 340, it sequitur.

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There is no evidence before the court that there ever was a mortgage on the slave Cudjo, except that offered by plaintiff himself; which shows that it was only inscribed in the parish of West Baton-Rouge, where the slave was located, in May, 1828, about five years *after* he was bought by the plaintiff.

The defendant's own testimony, shows that the slave was in the hands of plaintiff, a third possessor, when seized, and the hypothecary action was not pursued as required by law in such a case; neither does the judgment decree any privilege, or make mention of any mortgage as existing on the slave; and the execution issued on that judgment, only directs the marshal to seize and sell "real estate and slaves of the said defendants (the heirs of Delaterre) in your district, whereof they are owners on the 1st day of March, 1828, last past," at which time they had no pretence of title to Cudjo, for the plaintiff had bought him of them in 1821. The seizure was, therefore, perfectly illegal and irregular. If there was any mortgage on the slave, it was extinguished by the sale, by order of the Court of Probates of West Baton-Rouge. The petition of plaintiff in suit No. 756, which was admitted in evidence, does not contain a judicial confession, that the slave was seized *and sold* in due course of law; it only goes so far as to state that the slave was *seized* in due course of law. the words are, "That in execution of said judgment, as the law directs, the said negro Cudjo was *seized* upon by the United States' marshal by his deputy, *and so taken out of the possession of your petitioner in due course of law*; and was sold subsequently, sold, &c. The words, "in due course of law," do not refer to the sale, but only to the seizure and the taking out of the possession of the plaintiff. Even then admitting the seizure to have been legal, was the sale so likewise? It was not. By the rules of proceedings anterior to the *Code of Practice*, and which were adopted for the Federal Court, by act of Congress, in 1824, a sheriff's

sale was not legal without a deed, and that deed in a certain form, &c. See *2d Moreau's Digest*, p. 333. *Martin's Reports*, vol. 11, p. 706. and *2d Louisiana Reports*, 476. *Bradbury et als. vs. Morgan et als.*; and in this case nothing like such a deed is produced.

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The district judge erred in admitting the plaintiff's petition in suit, No. 757, as containing a judicial confession; because a judicial confession can only be made by the party himself, or by one specially authorised by him to that effect. *La. Code*, art. 2270, *Martin's Reports*, N. S. 5th vol. 309. The allegations therein relied upon, were negatived by the judgment of the court in that case; and they are formally contradicted on oath, by the plaintiff himself, in this very case. The said petition should not have been admitted in evidence, as containing a judicial confession, because it was not offered by defendant's counsel for that purpose, but only in support of the plea of *resjudicata*.

The judgment under which it is pretended the execution issued, under which the slave was seized, should not have been admitted in evidence; because on the face of it, it appears that it was confirmed on a default, and it does not appear that three judicial days occurred between the judgment by default and the final judgment.

The return on the execution by the marshal, no where shows that the slave was sold; the only part of which comes near it, is in these words, which is no mistake in the transcript, for it was noticed and collated with the document offered in evidence. "Re-advertised the slaves Cudjo and Esther for sale, and after due notice, they were exposed to public sale on the 26th January, 1824, for twelve months credit, for three hundred and forty-five dollars. Returned into court, James Nicholson, deputy marshal." Which says nothing more than that the slaves were exposed for sale.

The defendant's title, which is one resulting from a forced alienation, must be strictly regular in every point, and if it cannot show a valid judgment, and proceedings under it authorized by law, and that the slave was duly advertised, and that the slave was regularly sold, and a deed given as

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required by law, the defendant must be condemned to pay the value of the slave and hire, to the plaintiff, who has proved his title completely to the said slave. *Duform vs. Compana, Martin's Rep., vol. 11, p. 706.*

Cuvilier, for defendant and appellee, moved to dismiss the appeal, because,

1. That said plaintiff, though he expresses *his wish* to appeal, does not at all *pray for* an appeal. Therefore, the order of the judge *a quo* granted more than was asked from him.

2. Said plaintiff does not allege in his said petition, that it is aggrieved by the judgment alluded to in said petition.

BULLARD, J., delivered the opinion of the court.

This is a suit to recover a slave in possession of the defendant. The plaintiff prays that he may be condemned to surrender him, or in default thereof, within a reasonable time to be paid his value; and for his services, at the rate of one hundred dollars per annum.

The plaintiff shows that he purchased him at a probate sale of the estate of the widow Durand, in 1823, and remained in possession several years, when he was taken out of his possession by the marshal of the United States, for the district of Louisiana. The defendant sets up title under a sale by the marshal, under an execution sued out of the District Court of the United States, to satisfy a judgment recovered by the heirs of Durand, against the representatives of the widow Durand. He exhibits a mortgage given on the slave by the widow Durand in her life time, in favor of the heirs of her deceased husband. No deed by the marshal is exhibited.

The plaintiff contends that a sheriff's deed, is the only legal evidence of a forced sale. That the defendant cannot make out any title, by exhibiting merely the marshal's return. On the other side, it is contended that in a suit by the present plaintiff against his vendors in warranty, he had stated in his

petition, that the slave in question had been taken by the marshal, and in due course of law sold; that this judicial avowal precludes the plaintiff in the present suit. Taking the confession in its utmost latitude, and it amounts to nothing more than a declaration that the marshal, to satisfy a judgment, not against him but to which he was a stranger, which was as to him, *res inter alios acta*, his property had been seized and sold. It is not easy to perceive how either the act of the marshal, or the admission of the plaintiff, could divest the plaintiff of his title. The judgment was not against him, nor was the marshal authorised to seize his property. If the marshal's deed went in evidence, what would it prove? It might serve the defendant as a title on which he might perhaps base a plea of prescription, but surely it would not show the consent of the plaintiff to the sale. Nor does his confession show it; it simply shows a fact which he thought at the time amounted to an eviction, and opened his recourse in warranty.

But it is said that the slave was sold to satisfy an outstanding mortgage, in favor of the heirs of Durand. It is a sufficient answer to this, first, that if the mortgage existed, Joyce was a third possessor, and the property could not legally be sold, without pursuing the hypothecary action; and, secondly, that in point of fact, the mortgage had been extinguished by the sale, in pursuance of a judgment of the Court of Probates. It has been settled by this court, that all mortgages created by the deceased, are extinguished by a probate sale of the mortgaged property.

Under this view of the case, we should be of opinion that the plaintiff would have been entitled to recover; but, *pendente lite*, the slave died of the cholera, and the case presents itself in another, and rather novel aspect. The plaintiff contends that he is entitled to recover the value of the slave, and of his services after the inception of the suit, inasmuch as the defendant was in bad faith. He relies as to the value of the slave, on the 229th article of the *Louisiana Code*: "If the thing duly received is an immovable property, or a corporeal movable, he who has received it is bound to restore in kind

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If a mortgage exists on property in the hands of a third possessor, the property can be legally sold under it, only by pursuing the hypothecary action.

The sale of property by order of the Court of Probates, extinguishes all mortgages created by the deceased.

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NOTICE

TO

**POTER & DE LA
LANDE.**

It seems that the article 2290 of the Louisiana Code, applies to cases in which the possessor was from the first a wrong doer and an usurper, acting with a knowledge of his want of faith. It cannot be said that the purchaser at the marshal's sale, participated with the latter in the original trespass by seizing and selling property without authority.

if it remain, or its value if it be destroyed or injured by his fault; he is even answerable for its loss by *fortuitous events*, if he received it in bad faith."

This article seems to us to apply to cases in which the possessor was from the first a wrong doer and an usurper, acting with a knowledge of his want of right. It cannot be said that the defendant participated in the original trespass. He received the property from the marshal, and there is no evidence that he knew of the title of the plaintiff, before this suit was brought.

As our Code does not seem to have provided expressly for a case of this kind, we are compelled to resort to first principles, to natural law and reason. The safest interpretation of natural law, and the best aids of our reason, are those profound thinkers whose works have come down to us, and whose spirit breathes throughout our civil jurisprudence; and although the ancient civil laws have no longer in our tribunals the sanction of legislative authority, we cannot shut our eyes to the light they shed along our path, while following the imperfect clue of a written Code.

The text of the *Roman Digest*, to which we are referred by the plaintiff's counsel, establishes the general principle, that after the *contestatio litis*, all persons, although originally *bona fide*, become persons in bad faith. The reason given by Ulpian, is, "*Coepit enim scire rem ad se non pertinentem possidere se is qui interpellatur.*" This law relates to a suit for an entire succession, and the edict of the Emperor Adrian, here commented upon, seems to have laid down this principle, that after judgment in his favor, the plaintiff ought to obtain all which he would have been entitled to, if the succession had been surrendered to him at the moment suit was instituted. In commenting on this edict, in law 40, of the same book, Paulus thinks the application of the rule would be too severe. For, says he, how would it be if after the *litis contestatio*, some slaves had died, or animals had perished? According to the discourse of the Emperor, the possessor would be responsible for their value, since the plaintiff, having found them in the succession, might have

sold them if the estate had been given up at once on his demand. Proculus thinks this would be just as relates to effects or objects *specifically demanded*, but Cassius thinks otherwise. In my opinion, continues Paulus, Proculus is right as relates to a possessor in bad faith, and the opinion of Cassius, in relation to a possessor in good faith, is equally well founded; for a possessor in good faith ought not to be responsible for their mortality, nor abandon the defence of his rights through the fear of such an accident. Paulus again, l. 27, t. 1, *De rei vindicatione*, which is the case before the court, says, "*Quod si litis contestationis tempore possedit cum autem res judicatur sine dolo malo amisit possessionem, absolvendus est possessor.*" 3 Pothier's *Pendats*, p. 715.

The learned Gregorio Lopez, in commenting on the sixth law, title fourteen of the sixth Partida, which establishes the general principle, in relation to suits for an entire succession, that the possessor in bad faith is responsible for the destruction of the effects, after the *contestatio litis* though not before, but that the possessor in good faith never is; says, that although after the *contestatio litis* all possessors stand on the same footing, all equally trespassers, yet this principle relates only to fruits recovered or to be received, but that it is otherwise as to the destruction of the thing, for in that case there is a difference between a possessor in bad faith *veré et à principio*, and one who becomes so *ficté* or by fiction of law, after the *contestatio litis*, that he who was originally in good faith, is not liable for the destruction of the thing *without his fraud or fault*. This seems to us a sensible and reasonable distinction. A possessor when informed by suit, of a better title, may have just reasons for defending his title, with a view to his recourse in warranty. It is a right which he is not bound to abandon at the first notice. We are, therefore, of opinion, that the defendant is not liable for the value of the slave.

The remaining question is, whether the defendant ought to be condemned to pay for the services of the slave, after the institution of the suit, and until he died? We assume as a principle, that the slave still belonged to the plaintiff,

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The possessor who was originally in good faith, is not liable for the destruction of the thing, without his fraud or fault.

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though possessed by the defendant. If it had been a female slave, and she had given birth to a child, after the *contestatio litis*, the child would, in our opinion, have belonged to the plaintiff. The defendant had profited by the labor of the slave in dispute, up to the time of his death. On this point we have the express authority of the Roman Digest. *Utiq; autem, etiam mortuo homine, necessaria est sententia propter fractus et partus et stipulationem de evictione.* Same title l. 16, and Gaius again in law 20, "*nec enim sufficit, corpus ipsum restitui; sed opus est, quod habiturus foret, si eo tempore quo judicium accipiebatur restitutus illi homo fuisset.*"

Such a possessor is however for the fruits and revenues of the thing, from the time he received the property, until the time of its destruction.

These authorities, which are in fact but deductions from acknowledged axioms of law, and particularly that which forbids one man to enrich himself at the expense of another, seems to us fully to authorise the court to decree, that the defendant shall pay the value of the services of the slave, from the time this suit was brought until his death. The evidence shows that he lived about six months after the inception of the suit, and that his services were worth about seventy-five dollars per annum.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and that the plaintiff recover of the defendant, the sum of thirty-five dollars with costs of both courts.

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APPEAL FROM THE PARISH COURT, FOR THE PARISH AND CITY OF NEW-ORLEANS.

In cases where the evidence, in any manner supports the verdict of the jury, the Supreme Court will not disturb the verdict, as founded on matters of fact, but the cause will be remanded, when the Supreme Court cannot fully concur in the conclusion of the jury.

The petition avers, that the plaintiff, in the summer of 1831, and for some time previous thereto, she kept a boarding house; that in said house she had a great quantity of furniture, belonging to her, such as was necessary for such an establishment, amounting in all to about five thousand five hundred dollars.

That in the latter part of the summer of 1831, she put the said furniture, *in the hands* of the defendants, with the understanding, that they were to keep the same safely until the fall of that year for her, when she expected to resume keeping a boarding house, but previous to that time, and during her absence, the defendants *had permitted the whole of the furniture, to be sold at private sale or public auction, at a great sacrifice*; that which had cost her five thousand five hundred dollars, having been sold for only one thousand six hundred and fifty-five dollars and forty-two cents.

The defendants pleaded the general denial. They averred that they had advanced the plaintiff large sums of money, and had at various times, and to various persons, given her credit and become responsible for her obligations, all of which was purely gratuitous on their part; that the furniture mentioned in the petition, was not put in their hands, as alleged, but was placed there by Ralph Wells, to whom the same was sold by petitioner, who authorised Gustavus Schmidt, Esq., to sell the same, either at public or private sale; that said Schmidt authorised and directed said furniture to be sold; that part of the same was sold at public auction, after due notice, and the remainder at private sale; that the whole was sold to the best advantage, and appropriated as directed by said Wells, to the payment of certain privileged claims thereon, subject to which he had purchased the same.

Montgomery, a witness for the plaintiff, testified that his claim of four or five hundred dollars, for rent against the plaintiff, was settled by a note of Mr. Newton, in May, 1831.

Grant testified that the furniture sold by J. Le Carpentier, on the 29th September, 1831, was that received from the plaintiff by Mr. Newton.

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Le Carpentier, testified that the sale alluded to by Mr. Grant, had taken place by the direction of Mr. Newton.

G. Schmidt, Esq., testified that Ralph Wells requested witness to act as his attorney to sell some furniture which he had purchased from Mrs. Martin; that Wells stated it would give him no trouble, that the furniture was at Grant's, and that Grant and Newton would understand themselves about that sale. Witness thinks he never delivered an order for the sale of that property.

Wells, testified that the plaintiff had sold to him her furniture for a full consideration, and he had constituted Mr. Schmidt his agent to sell it.

The jury found for the defendant. The plaintiff appealed.

MATHEWS, J., delivered the opinion of the court.

This is a suit to recover remuneration for damages, which the plaintiff alleges she has sustained by unjust and illegal conduct of the defendants, in relation to certain property belonging to her, consisting of household furniture, which was placed in their possession, or under their control for safe keeping, and which they caused to be sold at a great sacrifice, without any authority from her, and to her great damage and injury, &c.

The cause was submitted to a jury in the court below, who found a verdict for the defendants, and judgment being rendered in pursuance thereof, the plaintiff, after an unsuccessful attempt to obtain a new trial, took the present appeal.

The answer contains allegations of many acts of beneficence done by the defendants to the plaintiff, during her residence in the city, to aid her in the business of inn keeper, which it seems was her occupation. They deny that they were ever her depositaries of the furniture set out in the petition, but that it was placed in their possession, or under their control, by a certain Ralph Wells, who had purchased the property from the plaintiff, and who empowered one Gustavus Schmidt, to sell it, &c., under whose authority they allege that it was sold for a fair price, some at auction and

some by private sale, and the proceeds applied to the payment of the plaintiffs debts. They further plead in reconvention, &c.

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The whole evidence of the case, as it appears on the record, creates a violent presumption in our minds, that the sale to Wells, (even admitting the act by which it is attempted to be supported, was signed by the plaintiff, which does not fully appear) was simulated, and that to the knowledge of the defendants. If this sale were simulated, Mrs. Martin was not divested of her right to the property. We are inclined to infer from Wells' entire testimony, which was taken, found in his answers to the direct and cross interrogatories, that he never paid a valuable consideration for the property, and that he was a mere nominal purchaser, with a view to serve the purposes and interest of the defendants. Our inference from the testimony of this witness is forceably corroborated by that of Schmidt, his pretended agent. He was informed by his principal, that the business would give him no trouble, that Grant (in whose ware house the furniture was stored) and Newton would understand themselves about the sale. The witness on cross examination, stated that he never delivered any order for the sale of the property, and has a slight recollection, that Mr. Newton told him that the furniture had been sold, &c.

The verdict of the jury can be fully justified, only in the belief that the entire interest of the plaintiff in the property, which forms the basis of the present action, was transferred to Wells by the pretended sale, and that consequently the defendants did not illegally interfere in the disposal of it to her prejudice. In cases where the evidence does in any manner support the verdict of juries, this court is not in the habit of disturbing their decisions, as founded on matters of fact, but it is not unusual for us to send a cause back for a new trial, before a second jury, when we cannot fully concur in the conclusion of the first. There is something rather mysterious in the present case, which may possibly be elucidated by further testimony on a new trial, and the verdict of

In cases where the evidence in any manner supports the verdict of the jury, the Supreme Court will not disturb the verdict as founded on matters of fact; but the cause will be remanded when the Supreme Court can not fully concur in the conclusion of the jury.

EASTERN DISTRICT, 1834. another jury, being probably better calculated to solve matters of this nature than the court.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, the verdict of the jury set aside, and the cause remanded for a new trial. The appellees to pay the costs of this appeal.

Worthington, McCaleb and Gray, for plaintiff and appellant.

L. C. Duncan, contra.

BLANCHARD ET AL. vs. STATE OF LOUISIANA.

APPEAL FROM THE COURT OF THE SECOND DISTRICT

The act approved in March, 1827, absolutely prohibits any resort to the property of the sureties of the sheriff, until all that of their principal in the parish has been exhausted.

Insolvency is not presumed.

The plaintiffs, sureties of Firmin Blanchard, sheriff of the parish of Assumption, obtained an injunction against a treasury execution, issued against themselves and their principal.

The petition alleges the notice served on them by the coroner, the seizure under the execution, and the illegality of the proceedings, under an act of the legislature, approved on the 15th March, 1827, by which it is provided, that in future no person to whom an order of execution by the state treasurer for the collection of any sums of money due by tax collectors, in the different parishes in the state, and for which they are in arrears, shall

seize and sell the property belonging to the security or securities of said collector, until after having previously seized and discussed all the movable and immovable property belonging to the said tax collector, situated in the parish in which each of them shall have his domicile.

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That said Firmin Blanchard possessed at the time of the notice, and now possesses, considerable movable and immovable property in the parish of Assumption, the place of his domicile; which property it was the duty of the coroner to have seized and discussed, before making seizure on that of the plaintiffs.

The district attorney, on behalf of the state, moves to dissolve the injunction, because the plaintiffs in injunction have not pointed out any property of Firmin Blanchard to be discussed, and have not furnished or tendered any sum to have the discussion carried into effect.

The judge *a quo* dissolved the injunction. He considered that the right of discussion conferred on the surety by the act of 1817, referred to a judicial discussion of property within the parish.

The plaintiffs appealed.

Nicholls, for plaintiffs and appellants, contended that:

1. Previously to the act of the legislature, approved March 15, 1827, securities of public officers, were securities nominally, only. They could not invoke the provisions of the Civil Code for their protection; they were not entitled for the benefit of discussion, nor to any of the privileges accorded to securities.

2. By the act of the legislature, approved march 15, 1827, all persons are prohibited from *seizing* or *selling* the property of securities, until after having previously seized and discussed all the movable and immovable property belonging to the collector.

3. The first act of the coroner, viz: the *seizure*, being illegal, all subsequent proceedings were tainted with the same vice. *Mor. Digest*, vol. 2, p. 348.

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4. The securities, if required by law, to point out the property which is perfectly obtained, and no other opportunity of so doing, as the first and only notice they received, was the notice of the seizure made on themselves.

Seghers, for defendant and appellee, contended that:

1. The general averment in plaintiff's petition, that their principal debtor was possessed of some property, real and personal, is quite insufficient. The averment ought to have been special, and to have stated of what his property consisted. This special averment is *the gist of the action*, since securities cannot claim the benefit of the law, unless they point out the property owned in the parish by their principal. Every circumstance which is proper to be known, ought to be stated in the petition; and a party will not be permitted to avail himself of what he did not allege, or at least, of what he did not allege in such a manner as to put the defendant on his guard, and let him know on what matter he is to come prepared with his rebutting evidence. The judge *a quo*, therefore, should not have granted the injunction, and was right in dissolving it, so much the more so as an injunction is an extraordinary remedy, and ought not to be allowed, except upon a sufficient affidavit, not on a vague and loose statement. In an *ex parte proceeding*, every thing should, *prima facie*, be full and satisfactory. Otherwise, how could the judge form an opinion whether it be a case for an injunction? and besides, it would be the means of granting injunctions improvidently, and in open contradiction with the views of the legislature on this subject, as is well known to the court, that our legislature, in several successive enactments, have submitted the sureties as well as the principal debtor, to the penalty of ten and even twenty per cent. damages, in case an injunction be dissolved, as having been improvidently issued.

MARTIN, J., delivered the opinion of the court.

The petitioners obtained an injunction to stay proceedings on a seizure of their property, on an execution of the trea-

sureties they are, suggesting that the notice served on them, and the seizure of their property, was illegal and void; the act approved on the first of March, 1827, providing that no person to whom an execution issued by the state treasurer, for the collection of any money due to the state, by collection of taxes in the different parishes, shall seize and sell the property of any surety or sureties of such collector, until after having previously seized and discussed all the moveable and immovable property of such collectors, situated in the parish in which each of them shall have his fixed domicile. The petition avers that their principal had movable and immovable property in his parish, at the time of the seizure of their own, and still continues to possess such property.

The district attorney demanded the dissolution of the injunction, on the ground that the petitioners had neither pointed out any property of their principal, or made a tender of money to defray the expenses of a discussion.

The injunction was dissolved, and the petitioners appealed.

Their counsel has contended, that before the act of 1827, sureties of collectors could not be entitled to the plea of discussion, nor any benefit held out by law to ordinary sureties, being bound jointly and severally with their principals. Their situation is improved by the act, and they are placed even on a more favorable footing than ordinary sureties. No part of their property is to be touched, till every part of that of their principal in the parish has been seized and discussed. Any seizure of their property, before that of their principal in the parish was seized and discussed, was an illegal act against which they had a right to pray for the interference of the court.

It has appeared to us the defence of the district attorney, rests on the assumption of the proposition, that the act of 1827, places the securites of collectors, simply on the same footing of ordinary sureties, by allowing them to suspend proceedings against their property, on a tender of money to

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The act approved in March, 1827, absolutely prohibits any resort to the property of the sureties of the sheriff, until all that of the principal in the parish has been exhausted.

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defray the expenses of a discussion; but we agree with the counsel of the appellant, that the act of 1827, absolutely prohibits any resort to their property, till after all that of the principal in the parish has been exhausted.

It has however been lastly contended, on the part of the state, that the injunction was correctly dissolved, on account of the insufficiency of the petition, which alleges vaguely the existence of property of the principal in the parish, without specifying any distinct object of it, so as to enable the state to disprove the averment. The petitioners have expressly brought this case within the words of the act of 1827.

Insolvency is
not presumed.

Insolvency is not presumed, especially in so responsible an officer as the sheriff. The coronor was bound to look first for the property of the principal; this is not pretended to have been done. The existence of property is sworn to; and we look in vain in the record for any circumstance, from which it might be inferred, that the interposition of the court was improperly resorted to.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the injunction reinstated, and the case remanded for further proceedings.

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THE STATE, INTERVENOR.**

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ASSUMPTION.

The administration of an estate creates no legal mortgage on the property of the administrator. He is entrusted with the administration on the credit of his sureties.

A sale of mortgaged property by the sheriff under execution, does not extinguish the legal mortgage; a *fortiori*, the levying of an attachment on it cannot.

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The district attorney for the second judicial district of this state, filed on the 4th April, 1833, a motion wherein he informed the court that certain property of the defendants, seized by the coroner on a writ of *feri facias*, issued in this case, is the only property known, belonging to them. That the property so seized, is subject to a legal mortgage in favor of the state, for the amount of the collection bond for the state taxes, executed by one of the defendants in 1831, in his capacity as collector of said taxes, for the year 1830; that an execution has been issued by the state treasurer against said defendant and his securities, to enforce the payment of the sum of three thousand three hundred and eighty-three dollars and fifteen cents, for the taxes of 1830. That said execution is now in the hands of said coroner, who has levied on the same property attached and seized by him in this case, at the suit of the said widow and heirs of Pierre Blanchard, against the said defendant.

The plaintiffs were ruled to show cause why the coroner should not bring into court the proceeds of the property by him seized, after the sale thereof, and pay from said proceeds into the treasury the said amount of taxes, and the balance into the hands of the plaintiffs.

The plaintiffs' answer to the rule that the state ought not to be paid in preference to the claims of the plaintiffs. 1. Because there exists a legal mortgage in favor of the plaintiffs, on all the property of the defendant, as administrator of the estate of Pierre Blanchard, deceased, for the sum of thirty-two thousand five hundred dollars, since the 22d of September, 1827; that this mortgage, being of elder date, must be paid in preference to the state's mortgage. 2. That as the property was seized by the coroner, on the 14th of March, 1833, at the suit of the plaintiffs, there exists a lien on the same in preference to all other creditors.

The coroner testified that he knew of no other property

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belonging to the sheriff but that seized by him in the case of the plaintiffs against the defendant; that he holds in this case a writ of *fi. fa.*, and an execution against the defendant, issued by the state treasurer, to enforce the payment of the state taxes; that to satisfy the writ in both cases, he levied upon said property, and has advertised the same for sale, and shall hold the proceeds after said sale, as he may be directed by the court. The district attorney introduced as evidence, a certificate of mortgage, showing the recording of the bond of the sheriff and his securities, for the collection of the state taxes for 1830, and executed on the 21st of February, 1831.

The motion was overruled, with costs against the state, and the coroner ordered to pay to the plaintiffs the proceeds of the sale, to be made by him on the property seized.

The state appealed.

Seghers for intervenor and appellant, contended that:

1. The state cannot be decreed to pay costs. No money shall be drawn from the treasury, but in pursuance of appropriations made by law. *State Constitution*, art. 6. *Martin's Digest*, vol. 1, p. 112. The judgment of the inferior court ought, therefore, to be reversed.

2. According to the Louisiana Code, article 3280, no legal mortgage shall exist, except in the cases determined by said code. But a legal mortgage was afterwards granted to the state on the property of sheriffs and collectors of taxes, by sec. 10, p. 78, of the acts of 1830. No such mortgage exists on the property of an administrator of an estate, either by the Louisiana Code, or by any subsequent law. The judge *a quo*, therefore, erred in deciding the case in favor of the widow and heirs of Pierre Blanchard, inasmuch as an ordinary creditor cannot, by the mere act of seizure, acquire a preference over a mortgage creditor, whose mortgage is anterior to the seizure.

Crozier, for plaintiffs and appellees.

BULLARD, J., delivered the opinion of the court.

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The plaintiffs having recovered a judgment in the Court of Probates, against F. Blanchard, on his bond as administrator of their ancestor, caused an execution to be levied on a plantation and slaves, and other property of the defendant, which had at the inception of the suit been attached, the defendant being represented as an absconding debtor. The administration bond was given in 1827.

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After this *feri facias* had been levied, an execution issued by the state treasurer, against the same defendant, as collector of state taxes for the year 1830, and against his sureties, came into the hands of the coroner, who levied on the same property. The defendant's bond, as collector, bears date in 1831, and is certified to be duly recorded in the office of the parish judge.

At this stage of the proceedings the district attorney, on the part of the state, obtained a rule on the plaintiffs, to show cause why the coroner should not bring into court the proceeds of the property seized, after he should have sold the same, and why they should not be distributed, as follows:

First, To the state the amount due for taxes with costs, and the balance, if any, to the plaintiffs, in satisfaction of their judgment.

This proceeding is based on an allegation, that the property seized is the only property of the defendant, in virtue of articles 301 and 722, of the Code of Practice.

In answer to the rule, the plaintiffs denying that the state has a legal mortgage, contend,

First, That there exists a legal mortgage on the property of the defendant, as administrator of the estate of Pierre Blanchard, for the sum of thirty-two thousand five hundred dollars. Since the 22d day of September, 1827, the date of his bond, which was duly recorded, and is of a date prior to that in favor of the state, as collector of taxes.

Second, That the property seized and levied on, was attached at the suit of those creditors, on the 14th March, 1832, and thereby a lien was created on said property in

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their favor, which gives them a preference over all other creditors, and over the state. The Probate Court discharged the rule at the costs of the state, being of opinion that the administrator's bond being of prior date, to that given by the defendant, as collector of taxes, ought to have the preference, and that the seizure under the attachment gave the plaintiffs a lien on the property attached, which ought to be preferred to the claim of the state. The coroner was ordered to pay over the whole proceeds of the sale to the plaintiffs, and the state appealed.

By the act of 1830, it is declared that the state shall have a legal mortgage on the lands, slaves and real estate, of sheriffs and collectors of taxes, to secure the due performance of their official duties. *Acts of 1830, p. 78, sec. 10.*

Article 3280 of the *Louisiana Code*, declares that no legal mortgage shall exist, except in the cases determined by the Code. Among the cases enumerated, in which such mortgage is declared to exist, that of administrators of estates is not to be found. It is clear, therefore, that no legal mortgage existed on the property of the defendant in favor of the plaintiff, in virtue of his administration bond. He was entrusted with the administration on the credit of his sureties, and the prior date of the bond does not give the heirs a preference over the state, whose claim, though subsequent, is secured by a legal mortgage. The only question then is, whether the levying of an attachment on mortgaged property, gives to an ordinary creditor a preference over the mortgagee? Such a doctrine would place the rights of hypothecary creditors at the mercy of every debtor, who might think proper to abscond, or to evade the service of legal process. It would in effect be permitting the mortgagor, by his own act, to defeat a legal mortgage, and to give a preference to ordinary creditors. Even a sale by the sheriff, under execution would not extinguish the legal mortgage, still less the levying of an attachment. We are of opinion that the court erred in discharging the rule.

The administration of an estate creates no legal mortgage on the property of the administrator. He is entrusted with the administration, on the credit of his sureties.

A sale of mortgaged property by the sheriff, under execution, does not extinguish the legal mortgage, *a fortiori* the levying of an attachment on it cannot.

It is, therefore, ordered, adjudged and decreed, by the court, that the judgment of the Court of Probates, be avoided

and reversed, that the rule be reinstated and made absolute, that the coroner be ordered to pay out of the proceeds of the real estate and slaves, to the state treasurer, the amount of the execution in his hands with interests and costs; to pay over to the plaintiffs the balance, if any, of the proceeds of the land and slaves, together with the whole of the proceeds of the movables, and that the plaintiffs and appellees pay the costs of both courts.

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vs.
BRANDON.

MOONEY vs. BRANDON.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

This case presents a question of fact only.

This was a petitory action, brought in 1832, to recover twelve town lots, situated in the town of M'Donough, in the parish of Jefferson, and one thousand dollars as damages for the detention of possession.

The plaintiff's title was denied, and the general issue pleaded.

Title was set up under a deed of the state treasurer, purporting to convey to the plaintiff "all the right, title, interest and claim which Moses Duffy had" at or subsequent to the 1st of December, 1825. The introduction of this deed was opposed by the defendant, because no identity of the lots therein mentioned and those claimed was shown; but the judge *a quo* admitted it, and allowed the plaintiff to establish the identity by other proof.

The plaintiff produced the assessment roll for 1825, of the parish of Jefferson, on which Moses Duffy was placed as the owner of twelve town lots, in the said town; and the list of the non-residents of that parish for that year, also,

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containing the name of Moses Duffy as the owner of twelve town lots in the same town, and the amount of the tax upon them for that year.

The sale by the treasurer took place after the lots in question had been duly advertised, in 1828, for state taxes, due upon the lots claimed in 1825, and by virtue of the second section of an act entitled "An act supplementary to the several acts relative to the revenue, approved March 20th, 1818."

The defendant offered to pay the plaintiff the amount, eleven dollars, paid by the latter at the sale, but the defendant did not admit that the plaintiff had purchased the lots of which he was in possession.

The defendant had erected two small frame buildings on some lots, which he admitted to the witness, had belonged to the late Moses Duffy, who had purchased twelve town lots in the said town. Duffy had died before the sale, as witness believed, in Texas, and his widow, now defendant's wife, lived in the state of Mississippi.

Judgment was rendered for the defendant, the judge *a quo* being of opinion that the plaintiff had failed to show title in Moses Duffy, and that *that* was indispensably requisite to entitle the plaintiff to a judgment in his favor.

MARTIN, J., delivered the opinion of the court.

This is a petitory action, in which the recovery of twelve lots of ground in the possession of the defendant is sought, under an adjudication for taxes in arrear. The general issue was pleaded, and there was judgment for the defendant; the plaintiff appealed, after an unsuccessful effort to obtain a new trial.

The record shows that the plaintiff introduced in evidence the assessment roll, in which the defaulting taxable was charged with the tax, and the list of non resident owners, containing his name; finally the deed of sale of the treasurer of the state: publication was proved, &c.

The defence set up below was that the plaintiff had not purchased the lots in the possession of the defendant.

In this court the counsel of the plaintiff has relied on the following points.

I. That the defendant admitted at the trial that the defaulting taxable had a legal title to the premises.

II. That this was proved by the testimony of the witnesses of the parties.

III. That parol evidence having been given without any objection, written evidence was unnecessary.

The case presents no question of law, and the only question is whether such admission was made, and such evidence given. A close examination of the record has led us to the conclusion that the first judge did not err in considering that there was no admission nor evidence of the defaulter's title to the lots possessed by the defendants.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the District Court be avoided, reversed, and annulled; and that there be judgment in favor of the appellant, as in a case of non-suit; the said appellant paying the cost in this court.

Preston, for plaintiff and appellant.

McCaleb and Gray, for defendant and appellee.

ANDERSON ET AL. vs. STEPHENS.

APPEAL FROM THE COURT OF THE SECOND DISTRICT.

The clerk's certificate that the record contains a full transcript of all the pleadings, proceedings, documents, and evidence on file in the case, does not authorize the conclusion that all the evidence adduced was put on file and is therefore insufficient.

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The plaintiffs claimed of the defendant one thousand five hundred dollars, the amount of one instalment of the purchase money of the sale by the plaintiffs to the defendant, of a tract of land in the parish of Lafourche.

The defendant pleaded the general issue, to which he added several special pleas.

Judgment was rendered in favor of Anderson for two hundred and three dollars and fifty-three cents, and in favor of his co-plaintiff for seven hundred and twenty-six dollars and fifty cents. The defendant appealed.

The clerk of the court certified the record as follows.

"I the subscribing clerk of the second judicial District Court, sitting in and for the interior parish of Lafourche, certify the foregoing a true transcript of all the pleadings, proceedings, documents, and evidence on file, and of all the orders on record in the said court in the case," &c.

The appellant filed the transcript in November and his points in January following.

Wheeler and Taylor for plaintiffs and appellees.

1. By the stipulation of the act of sale, Stephens had a right to part from the two first payments of two thousand dollars each for one year after they became respectively due, if his crops were not sufficient to pay after deducting expenses. There was no testimony adduced to establish the occurrence of the event on which the right to part from depended. But if that had been proved, it would not have affected the obligations to pay, for more than one year had elapsed before suit was brought after the instalment fell due. *Civil Code*, 2036.

2. The plaintiffs cannot be delayed by the mere suggestions of defect of title contained in defendant's answer. Stephens must pay the price, because if even the title to the land sold was defective, he had not brought himself within the rule since he does not allege that he has just reason to fear he will be disquieted. *Faulk vs. Woolbridge, Louisiana Reports*, 2, 99. *Civil Code*, 2535.

3. No deficiency in the quantity of the land sold is shown. If there had been a deficiency, Stephens would not be entitled to a diminution of price, for it was sold from boundary to boundary for a round sum. *Civil Code*, 2468, 2471.

4. The death of Anderson is not proved, but if it was it would produce no effect on the proceedings. Mrs. Anderson renounced her mortgage, and so did Mr. Nettleton. *Code of Practice*, art. 21.

5. There are no grounds for an appeal, and there is nothing on record by which the correctness of the decision of the tribunal of the first instance can be examined, since the record is not certified according to law; there is no statement of facts, bill of exceptions to the opinion of the judge, or special verdict, nor a judgment of error; and the judgment of the inferior court must be affirmed with damages. *Code of Practice*, arts. 586, 897. *Nicholls vs. Petaguin*, 7 N. S., 608. *Pugh vs. Erwin*, 6 N. S., 159.

Nicholls, for defendant and appellant, contended that:

1. The court *a quo* erred in refusing to make the widow and heirs of Anderson parties to the suit.

2. The plaintiffs could not recover without having made a previous tender of release, nor were they at any time in a capacity to make said release.

3. The court erred in refusing to order a survey.

MATHEWS, J., delivered the opinion of the court, which was the same as in the case of *Nettleton vs. Stevens*, ante, 165.

This appeal must be dismissed at the appellant's costs. The certificate of the clerk states that the record contains a full transcript of all the pleadings, proceedings, documents, and evidence on file in the case. There is no statement of facts, bill of exceptions, or special verdict; and the appellant has suffered the period fixed by law to pass, without any assignment of errors apparent on the face of the record.

Nothing authorises the conclusion, that all the evidence adduced was put on file.

It is, therefore, ordered, adjudged and decreed, that this appeal be dismissed with costs.

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The clerk's certificate that the record contains a full transcript of all the proceedings, documents, and evidence on file in the case, does not authorize the conclusion that all the evidence adduced was put on file, and is therefore insufficient.

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BENSON ET AL. vs. ALLISON.

BENSON ET AL.
vs.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

ALLISON.

In an action for work and labor performed under a contract, the plaintiff reciting in his petition an order or draft, not negotiable, drawn in his favor by the defendant on a third person, and the defendant denying due diligence in the presentation of the draft, and claiming a discharge on that ground: *held* that the draft was not to be considered as a commercial bill of exchange, but was merely an indication of a settlement between the parties, showing the amount really due on the contract, and for this purpose it was admissible in evidence.

The petition avers that the plaintiffs, having completed a contract for work, made between them and John Allison, received on a settlement with him, an order or draft, dated 1st August, 1833, drawn by said Allison, on J. D. Baldwin, in favor of the plaintiffs, for the sum of four hundred and eighty-five dollars and fifty-five cents, payable at sight; that the said draft was presented to the drawer, who refused payment of the same, and that the draft was thereupon protested for non-payment.

To these allegations the defendant answers, that he acknowledges his signature to the draft sued on, but denied that he is liable to pay the same, for want of due diligence on the part of the plaintiffs and drawees, in the presentation for acceptance and payment, and in the protest of the draft, and also for want of due notice of its dishonor; which notice, as well as all other allegations of the petition, he denies.

In case the court should decree, that the payees of said draft have been guilty of no laches in the promises, then he pleads in payment a sum of one hundred dollars, paid by him to them on account of work done upon the upper market.

The draft in question was written in the following words:

"Mr. J. D. Baldwin, please pay to Messrs. Benson and Elleby, four hundred and eighty-five dollars and fifty-five cents, and charge the same to my account.

signed,

"John Allison.

"New Orleans, 1st August, 1833."

The protest was dated on the 30th of September, 1833, and the notary public certified that not knowing where to find the drawer, he had notified him of the protest, by a letter addressed to him, and deposited on the same day in the post office of New-Orleans.

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J. D. Baldwin, testified for the plaintiffs, that he had refused to pay the draft, because he was not bound by his contract with the defendant, to do so. The witness had funds in his hands belonging to defendant, at the time of presentment.

Headington testified that at the request of the plaintiffs he measured the work performed by the plaintiffs, on the market, in faubourg St. Mary. After the measurement defendant appeared satisfied with it.

The plaintiffs had judgment for three hundred and thirty-two dollars and thirty-three cents, and the defendant having failed in his attempt to obtain a new trial, appealed.

Preston, for plaintiffs and appellees.

Buchanan, contra, contended that:

1. Improper evidence was admitted on the part of the plaintiffs, in the court below.
2. The plaintiffs were guilty of laches in the presentation of the draft sued upon for acceptance and payment, which has released the drawer.
3. The notice of protest was illegal and insufficient.
4. There is error apparent in the judgment.

MATHEWS, J., delivered the opinion of the court.

This suit is brought to recover the value of work and labor performed by the plaintiffs under contract with the defendant. They obtained judgment in the court below, from which the latter appealed.

The petitioners recite an order or draft drawn in their favor by the defendant, on *J. D. Baldwin*, who, according to

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In an action for work and labour performed under a contract, the plaintiff reciting in his petition an order or draft not negotiable, drawn in his favor by the defendant on a third person, and the defendant denying due diligence in the presentation of the draft, and claiming a discharge on that ground; held that the draft was not to be considered as a commercial bill of exchange, but was merely an indication of a settlement between the parties, showing the amount really due on the contract, and for this purpose it was admissible in evidence.

the evidence, was the prime undertaker of the work, a part of which was done by the plaintiffs, at the instance of Allison, who appears to have been a sub-contractor. The only defence set up against this claim, is want of legal diligence on the part of the plaintiffs, in endeavouring to collect the amount of the draft from the drawee; which, perhaps, might prevail, if the instrument were to be considered in the light of a commercial bill of exchange.

We are however of opinion that the court below was correct in refusing to it this character. It was not drawn in a negotiable form, and may properly be considered as merely indicative of a settlement between the parties, showing the amount really due to the claimants on that contract at that time, and for this purpose was properly received in evidence. The allegation in the petition of the existence of the previous contract, and performance on the part of the plaintiffs, is not denied.

Ten per cent. is claimed as damages in the answer to the appeal, but we do not believe that the circumstances of the case require that any penalty should be inflicted on the appellant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs in both courts.

ROBERTSON vs. BOSQUE ET AL.

APPEAL FROM THE COURT OF THE PARISH AND CITY OF NEW-ORLEANS.

Where the plaintiff by an order of the Parish Court of the parish and city of New-Orleans, had enjoined the payment of the proceeds of a steam boat, sold by order of the City Court, without making those persons

parties, who were interested in opposing the plaintiff's claim, held such an injunction was properly dissolved on the intervention of one of the judgment creditors in the City Court.

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ROBERTSON
VS.
BOSQUE
ET AL.

Damages will not be given where the appellant can be supposed to have entertained an honest doubt.

An action was instituted in the Parish Court against Theophilus Bosque and Agenor Bosque, as owners of the steam boat Atlas. The plaintiff claimed a privilege on the steam boat for upwards of fifteen hundred dollars, which he alleged was due him for his wages on that boat, in the capacity of engineer. The boat was provisionally seized for this claim.

In a supplemental petition, the plaintiff stated that the boat since her seizure under the order of the Parish Court, had been sold by the marshal of the City Court of New-Orleans, and the proceeds remained in the hands of that officer: that several orders from the City Courts to pay over to other claimants had been served on the marshal, and there was danger of the plaintiff losing his debt. He obtained an injunction preventing the marshal from paying over the proceeds then in his hands.

The defendants answered, pleading the general issue, and denying that they owned the steam boat.

A rule was next obtained on the plaintiff, by John Martin, to show cause why the injunction should not be dissolved, on the grounds that it had issued contrary to law, and the proceeds of the sale had not been so placed as to enable the Parish Court to dispose of them.

The judge *a quo* sustained the motion to dissolve. The plaintiff died. The curator of his estate who appeared, having failed to obtain a new trial, appealed.

Buchanan, for plaintiff and appellant, relied on the following points and authorities:

The extent of the jurisdiction of the City Court of New-Orleans, is three hundred dollars. See *Moreau's Digest*, 1st vol. page 345, sec. 9.

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The claim of plaintiff was for fifteen hundred dollars, or thereabouts, and a privilege was alleged in the petition. It is evident that this sum exceeded the competence of the City Court, and could not be decided in said Court. One of two things was, therefore, to take place, either the plaintiff had a right to resort to a tribunal competent to decide upon his demand, and in order to make such resort effectual, had a right to stop the proceeds of the thing upon which he claimed a privilege, until that claim could be investigated, contradictorily with the parties interested: or, the previous seizure of the steam boat, by virtue of process from the City Court, barred the claims of creditors above three hundred dollars, and left them without a remedy against the thing which the law made bound for the debt, by article 3204 of the *Civil Code of Louisiana*.

The article 285 of the *Code of Practice*, clause 3d, and article 289 of the same *Code*, gives to persons engaged in the navigation of vessels trading within the state, the right of provisionally seizing such vessels for arrears of wages. Can it be contended that a prior seizure, by a court whose jurisdiction is limited to a certain sum, shuts out from all share in the distribution of proceeds, all persons whose claims exceed such limit? Suppose that the first seizure was made by the Parish Court of New Orleans; creditors for an amount below one hundred dollars, might intervene and lay their claims at an amount exceeding that sum. Judgment would be rendered in their favor only for the amount due them, the surplus which should have been alleged merely to give the court jurisdiction, being rejected. But suppose this plaintiff to have intervened in the City Court. To do so, he must have thrown off all that he claimed exceeding three hundred dollars, and could in no event have recovered more than that sum, which the City Court was competent to adjudge him. Here is shown a manifest inequality, to the disadvantage of the larger creditor.

The decision in the case of *Oger vs. Dannoy*, turned upon the 429th article of the *Code of Practice*, which declares that the manner of executing a judgment is to be determined by

the Court that has rendered it. 7 *Martin, N. S.* 658. In this case, our claim is totally unconnected with every thing that has taken place in the City Court.

The case of *Gasquet vs. Johnson*, 1st *Louisiana Rep.* 432, is also inapplicable. The present appeal does not relate to the claim against the owners of the Atlas, and is not intended to effect a *concurso* in regard of them, but turns upon the claim *in rem*, given to the plaintiff by the articles of the *Code of Practice* already cited, which claim is attempted to be taken from the plaintiff by the parties in the City Court.

The injunction sued out in the present case, is warranted by the 300th article of the *Code of Practice*, and follows the formalities laid down in article 304.

T. Slidell and Mace, contra, relied on the following points and authorities.

1. The injunction was illegally issued, the Parish Court having no authority to enjoin the proceedings in the City Court. Article 127 *Code of Practice*. The Parish and City Court of New-Orleans has a concurrent jurisdiction with the 1st District Court, subject to the same restrictions and rules. Article 295. This opposition is a demand brought by a third person, not originally a party in the suit, for the purpose of arresting the execution of an order of seizure, on judgment rendered in such suit, or to regulate the effect of such seizure in what relates to him. Article 397. This opposition must be made before the court which has granted the order of seizure on the judgment, in virtue of which the provisional seizure has been effected. *Oger vs. Daunoy*, 7 *N. S.* 656. The court of the 1st district cannot enjoin the execution of a judgment from the city courts of New-Orleans. In this case the above articles of the *Code of Practice* are illustrated and enforced. Creditors' rights are in concurrence only in cases of actual insolvency by a voluntary or forced surrender on the part of a debtor. *Gasquet et al. vs. Johnson et al.* 1 *Louisiana Rep.* 432. See, also, *Code of Practice* 617, 629. See, also, article 401.

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2. Even if the injunction had been improperly issued, yet the plaintiff in injunction, was guilty of neglect in not taking the proper measures, by citation or otherwise, to bring the parties claimants in the City Court before the Parish Court. They are in no way made parties to the injunction suit, either by the prayer of the petition, or by subsequent proceedings. This was a laches on the part of the plaintiff, which, even if the Parish Court had authority to grant the injunction, would have justified its dissolution. Such opposition must be made by motion, of which due notice must be given, *both to the party who has made the seizure, and to the Sheriff.* Article 432.

MARTIN, J., delivered the opinion of the court-

The plaintiff's claim is for wages, as engineer. He obtained an order for the seizure of the boat, she was accordingly seized, but delivered afterwards to the city marshal's order, as he had before sold her, the plaintiff consenting thereto on the promise of the marshal to hold the proceeds of the sale, until the plaintiff's and the purchaser's claims were finally determined on.

On a supplemental petition, the plaintiff stating the sale of the boat and the claims of several persons as creditors, on judgments obtained before the City Court and Associate Judges, obtained an injunction to the city marshal, prohibiting him from paying the proceeds of the sale, or any part thereof, until the further order of the Parish Court.

Martin, who had obtained a judgment in the City Court, obtained a dissolution of the injunction, and the plaintiff having in the mean while died, the curator of his estate appealed.

Admitting that the City Court's interference, in the disposal of the proceeds of the sale of a boat in the hands of the city marshal was legal, it is clear the injunction was properly dissolved, as none of the persons having in these proceeds an interest, adverse to that of the plaintiffs, were made parties, and no step was taken to have these proceeds placed at the disposal of the Parish Court.

Where the plaintiff by an order of the Parish Court of the parish and city of New-Orleans, had enjoined the payment of the proceeds of a steam boat, sold by order of the City Court, without making those persons parties who were interested in opposing the plaintiff's claim, *held* such an injunction was properly dissolved on the intervention of one of the judgment creditors in the City Court.

Damages are asked for the frivolous appeal, but this appears to us to be a case in which the curator may be supposed to have entertained an honest doubt.

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VS.

FOWLER.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

Damages will not
be given where
the appellant can
be supposed to
have entertained
an honest doubt.

HAGAN ET ALS. vs. FOWLER.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A common interest in personal property, to be sold on joint account, constitutes a commercial partnership for the particular adventure; and any act fairly and honestly done, by one member of such partnership, is binding on the other.

The plaintiffs claim of the defendant the sum of two thousand four hundred and eighty-nine dollars, and fifty cents, being the amount of monies advanced, on account of the defendant, by the plaintiffs, in the year 1826, to John Flack, of New-York, for the defendant's one-third of losses on one hundred and seventy-five bales cotton, owned by Flack, the plaintiffs and the defendant, and shipped on their joint account, from New-Orleans to New-York, and thence to Liverpool, in the fall of the year 1825.

The defendant pleaded the general issue. He also pleaded that in the year 1825, he, and the said John Hagan & Co., shipped from New-Orleans on board the ship North America, on joint account, (the interest of John Hagan & Co., being two-thirds, and that of your respondent one-third,) to the city of New-York, there to be sold, one hundred and seventy-five bales of cotton, which upon arrival at New York, aforesaid, in the said ship North America, ought to have and would have brought, (after deducting all charges) the sum of sixteen thousand one hundred and sixty-two dollars and eighty-eight cents; one-third of which sum, to wit: five thousand three

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hundred and eighty-seven dollars and sixty-two cents, would have been the proportion of the defendant, that said John Hagan & Co. did not sell the said cotton as they should have done, (having the entire control thereof,) and as by the agreement between them and him they were bound to do. That he received from said John Hagan & Co., at the time of said shipment, four thousand three hundred and ninety-one dollars and thirty-five cents, leaving a balance of nine hundred and ninety-six dollars and twenty-seven cents still due, which he claimed in reconvention.

John Flack testified that at New-York, in the summer of 1825, the market was dull; that in June and July, 1825, the cotton market was very bad, and prices mostly nominal; that whenever a sale of the article was effected, it was generally at a price considerably lower than previous rates. The condition of that part of the community in New-York, engaged in the cotton business, was very precarious; the dealers in that article were looked upon with great suspicion, and confidence as to credit and stability among the whole of the mercantile community, was very much impaired. It was considered unsafe to sell on credit, and unless a cash purchaser could have been found, the witness could not under the then existing state of things, with prudence, have effected a sale of said cotton. This state of things continued until after the cotton had been trans-shipped at the port of New-York for England. The best disposition which could have been made of the cotton, in the then state of the cotton market, was the one which was in fact made of it, viz: to trans-ship it to Liverpool; that as he had a personal and direct interest, he used his best endeavors to make the most of it, and to turn it to the best account. It appears that the principal partner of the plaintiffs was at New-York at that time, and concurred in this act.

It is also in evidence from several extensive merchants, that their agents to whom the cotton was shipped that year for sale at New-York and Philadelphia exercised the discretion of shipping it to Liverpool, thereby occasioning heavier losses.

The judge *a quo* gave judgment for the defendant for the costs. The plaintiffs appealed.

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Pierce, for plaintiffs and appellants, contended,

1. That the jury erred in considering the parties not partners.

2. That plaintiffs were bound to use a sound discretion, which having done, as is allowed by the court, the defendant was bound.

3. The law and evidence of the case are in favor of the plaintiffs.

J. Slidell, for defendant and appellee.

MATHEWS, J., delivered the opinion of the court.

In this case the plaintiffs claim the reimbursement of money, which is alleged to have been paid by them for and on account of the defendant. Judgment was rendered for the latter in the court below, from which the former appealed.

The facts of the case show that the plaintiffs and defendant had a common interest in one hundred and seventy-five bales of cotton, the latter being interested to the amount of one-third, that this cotton was shipped from New-Orleans to New-York, in the summer of 1825, to be disposed of on joint account; that the consignee and factor of the parties, Flack, who it seems took an interest of one-third in the adventure, by consent of the plaintiffs who were interested to the amount of two-thirds, did not sell or otherways dispose of the cotton immediately on its arrival in New-York, but waited the coming of John Hagan to that city. On his arrival the market for this article was bad, and great want of confidence prevailed in regard to the solvency of persons who were disposed to purchase; the customary credit in sales of cotton was ninety days. Under these circumstances Hagan and Flack, who had become interested, as above stated, determined to reship the cotton and send it to Liverpool, where it was sold at a considerable loss on the original cost in New-Orleans. One third of this loss, which has been paid by the plaintiffs

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A common interest in personal property, to be sold on joint account, constitutes a commercial partnership for the particular adventure; and any act fairly and honestly done by one member of such partnership, is binding on the other.

for the defendant, they claim from him in the present action.

The first, and perhaps the only question of law arising out of these facts is, whether the plaintiffs and defendant may properly be considered as commercial partners, in relation to this adventure? This question was decided by the court below in the negative, and consequently judgment rendered in favor of the defendant.

If the doctrine assumed by the Supreme Court, in the case of *Purdy et al. vs. Hood et al.* 5 N. S. 626, and that of *Gougot vs. Roduquez*, 1 La. Rep. 508, be legally sound and orthodox, (which we believe to be true,) then we are constrained to say, that the District Court erred in its solution of the question as propounded, and consequently erred in its final conclusion and judgment on the whole cause. We hold that the parties to the present action were commercial partners *quo ad* the adventure in cotton, as stated in the petition, and that as such, any acts done by one of them, fairly and honestly, are binding on the others. It is not pretended that any thing fraudulent occurred in the present instance, nor does the testimony on record show any gross negligence in the conduct of the acting parties, such as might possibly in equity, and according to fair dealing, throw the whole loss on them. The authority cited on the part of the defendant, from Kent's Com., we consider as inapplicable to the present case. The author states distinctions in relation to the powers and disabilities of simple part owners of property, and partners in a commercial transaction, and the different rights arising out of those distinctions. But as has been already stated, we are of opinion that the evidence in the case, now under consideration, fully establishes the parties to be partners, and subjects them to the government of rules relating to partnership in trade.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled, and it is further ordered, adjudged and decreed, that the plaintiffs and appellants do recover from the defendant and appellee, the sum of two thousand four hundred and sixty-four dollars, with costs in both courts.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

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Breaches of contracts are either negative or positive, and the latter are not divested of their character on account of their being tortious or even criminal.

A contract of passage is broken if a cabin passenger be not allowed the cabin, or be compelled to share it with every hand on board; if he be not furnished with food, if he stipulated for it; if his situation be rendered uncomfortable, by any hand being allowed to molest him; and if he do not enjoy on board that ease and comfort for which the passage money is the consideration.

Female passengers further stipulate for a complete exemption from rude, indecent and brutal behaviour towards them.

This case was formerly brought before this court on an exception taken to the right of the plaintiff to recover against the defendants, on the facts stated in the petition, which exception was sustained by the inferior court. This court overruled the exception, reversed the decision, and remanded the cause. See 5 *La. Reports*, 431.

At the trial of the cause, Martinez, a witness for the plaintiff, proved the Spanish custom of a military officer demanding permission of his superior officer to marry. He verified the signature and official character of the captain general of Madrid, whose permission, granted to the plaintiff to contract marriage, was filed. He also verified the signature of the notary public, attesting the signature and official character of the curate, who certified to the extract from the register of marriages of a church in Madrid, by which it appears that the plaintiff and his wife were married according to the forms and ceremonies then and there required.

Capt. Morrison, of the steam tow-boat *Natchez*, which towed up the schooner *Tepeyrac*, carrying Mexican colors, and belonging to the defendants, testified that after the schooner was taken in tow, there was a great noise on board of the schooner. The plaintiff appeared, and declaring that he and his wife had been treated by the captain of the

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schooner in the most brutal manner, demanded permission to come on board the tow-boat. While the plaintiff and his lady were coming on board, the latter was in tears and much agitated. The captain of the schooner then used very harsh language towards her.

Palacios, was a fellow passenger on the voyage from Vera Cruz to New-Orleans, in the schooner. One night he heard the mate complain that he could not sleep for the noise, and that the plaintiff's wife had taken his berth; when, in fact, no noise had been made. The seamen acted as they pleased. The language of the mate, who, in fact, commanded the schooner during the voyage, was very vulgar and indecent; at breakfast, the captain and mate once used language grossly obscene, and on the plaintiff's remonstrance, and stating that his wife was unused to this language, the mate replied, "How do I know whether she is your wife or sweet-heart?"

Finch, another fellow passenger, testified, that the mate was in fact the master of the schooner, and that he gave all the orders, and that his language in the presence of the plaintiff's lady, was frequently unchaste and obscene.

Martinez, the Mexican consul, for New-Orleans, testified, that the "*Codigo de Comercio*," published in Madrid in 1829, forms the commercial code of the Republic of Mexico, except so far as it conflicts with its independance.

Argote, the Spanish counsul, for New-Orleans, testified, that up to the time of the modification, by the "*Codigo de Comercio*," the Commercial Code of Spain was found in the Ordinances of Bilboa, of which the copy entitled "Ordinances, &c., printed in Paris, in 1829, is a true one.

The plaintiff excepted to the charge of the court, that the jury should find for the defendants, if they considered the law of Spain sufficiently proved, and that by that law, the owner of a vessel was not liable for the tortious acts of the captain and crew; but for the plaintiff, if the law of Mexico was not sufficiently proved, or if they thought it did not exonerate the owner from such liability.

The jury returned a verdict for the defendants, and the plaintiff, without an attempt to obtain a new trial, appealed.

Plaintiff in *propria persona*, contended that:

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1. The judge *a quo*, instead of erroneously charging the jury, as he did, that it remained a doubt to be resolved or settled by them, whether a certain Spanish ordinance, promulgated in Madrid, A. D. 1829, long after the independence of Mexico or Spain, was or was not the law of Mexico, said ordinance having been improperly cited on the trial in favor of the defendants, ought to have decided that said ordinance was *not* the law of Mexico, because no act of the Mexican government, adopting that ordinance, was produced on that occasion.

2. The ordinance in question, although it had been legally admissible on the trial, ought to have been expounded by the judge to the jury, as meaning to exempt owners of vessels from criminal prosecutions only, on account of the misconduct of the masters or commanders of their vessels, whilst it left such owners liable, in damages, for the personal torts committed by those masters upon their passengers.

3. The violation of the contract of passage from Vera Cruz to New Orleans, ought to be adjudged by American jurisprudence, in contradistinction to Mexican jurisprudence, although the latter, soundly interpreted, agrees with the former, *pro hac vice*. *Partida*, 5, title 8, law 26. *Curia Philipica*, lib. 3. cap. 12, nos. 29, 40. 3 *Dallas*, 374. 6 *Peters*, 172. 2 *Kent*, 428, 429. 1 *La. Reports*, 248, 254.

4. The jurisprudence of the United States, subjects ship owners to damages for the personal torts committed by ship-masters upon their passengers. *See special judgment of the Supreme court in this case.*

De Armas, contra.

MARTIN, J., delivered the opinion of the court.

This case, which is that of a passenger claiming from the owners of a vessel, damages for the brutal behavior towards him and his wife, of the captain, mate and crew, was before us last summer, when we overruled the defendants excep-

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tions to the plaintiff's right of action against them, and remanded the case for further proceedings. 5 La. Rep.

The defendants pleaded the general issue, and had a verdict and judgment. The plaintiff appealed.

He has put his case before us on a bill of exceptions to the charge of the judge, who instructed the jury "that if they considered that the law of Mexico was sufficiently proven, and that by that law, the owner of a vessel is not liable for the tortuous acts of the captain and crew, they ought to find a verdict for the defendants, otherwise for the plaintiff.

This charge assumes the position, that a contract for passage on board of a vessel, is to be regulated by the law of the *terminus a quo* of the voyage, and the plaintiff contends, that the contract is subject to the law of the *terminus ad quem*. The voyage was between Vera Cruz, in the republic of Mexico, and New-Orleans, and he has accordingly urged that the law of this state affords the only legitimate rule of decision.

In the case of *Malpica vs. Knonn et al.* 1 La. Rep., which was a contract of freight, on a voyage between Vera Cruz and Havana, we held that the law of the *terminus a quo*, was to be resorted to. The decision of that case was the basis of our judgment in a subsequent one, that of *Arroyo vs. Currell*, *id.* 528, which was a contract for passage on a voyage, having the same *termini*.

In neither of these two cases was any notice taken of the law of the *terminus ad quem*. The plaintiff invoked the law of the *terminus a quo*, and the defendants that of their domicil.

The plaintiff, in this case, considering the question as to the operation of the laws of these two places, as not settled by these cases has insisted, that contracts entered into in one country, and to be performed and complied in another, are governed by the law of the latter. This question was very attentively considered by this court, in the case of *Depau vs. Humphreys*, 8 Martin N. S., which was that of a promissory note, made in this city, but payable in New-York, and we came to the conclusion, that although the latter place

was to regulate the payment of the note, that of this state was to be resorted to, in order to ascertain the legitimacy of the obligation of the maker.

It is likely that when the matter may be considered closely, it will appear that when a contract is to be carried into execution, as to its different parts, in several places, the law of each country is to regulate it as to such parts of the contract as are to be performed in it. But it is unnecessary to enter into the examination of this question, in the present case.

It is not denied that under the law of Mexico, or that of Louisiana, the owner is liable for the contracts of freight or passage entered by the master, and is liable for damages on a breach of either of these contracts.

Breaches of contracts are negative or positive, and the latter are not divested of their character, on account of their being tortious or even criminal. The pawnee or depositary of a cask of wine, may become liable in damages to the owner, by a negative breach of his contract, if by this his neglect, part or the whole of the liquor leaks out; by a positive breach if he draws it out and applies it to his own use. In the latter case, can any surety he may have given for his contract, escape from the liability for damages on a breach of contract, on the ground of its being the result of a tortious act?

In a contract of freight, the owner and master are liable for a breach of the contract, if the master by his neglect, suffers part of the goods to be damaged, or takes out part of them from their box or package; the act (being tortious in the latter case) will not on that account absolve the owner from his liability.

A contract of passage is broken, if a cabin passenger be not allowed the use of the cabin, or compelled to share it with every hand on board. If he be not furnished with proper food, if he stipulated for it. If his situation be rendered uncomfortable by every hand on board being allowed to molest him. Female passengers stipulate further, completely for an exemption from rude, indecent or brutal behavior towards them. The master is guilty of a negative breach of the contract of passage, if the passengers do not enjoy on board

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Breaches of contracts are either negative or positive, and the latter are not divested of their character, on account of being tortious, or even criminal.

A contract of passage is broken, if a cabin passenger be not allowed the cabin, or be compelled to share it with every hand on board; if he be not furnished with food, if he stipulated for it; if his situation be rendered uncomfortable by any hand being allowed to molest him; and if he do not enjoy on

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board that ease and comfort, for which the passage money is the consideration.

Female passengers further stipulate for a complete exemption from rude, indecent and brutal behavior towards them.

that ease and comfort for which the passage money is the consideration. If the master forcibly drives the passengers out of the cabin; if he compels them to lodge with the common hands; if by his rudeness, indecency or brutality, he shock the modesty of a female passenger, so as to oblige her to quit the cabin, or as to render the passage comfortless by a continued series of vexation, misery and torment, shall he, as those who are bound for the faithful performance of his contract, escape a liability and damages on the score of his conduct being tortious. If without being guilty of any of these acts, he stimulates the mate and crew to commit them, will not the consequence be the same? If without such stimulation, he suffers them to commit those acts and neglects, to prevent them, as the result to the party injured will be the same, his right to remunerate in damages cannot be different.

The charge of the District Court appears to us to be erroneous.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, the verdict set aside, and the case remanded, with direction to the judge not to give a charge to the jury, in contradiction with the opinion expressed in this decree. The appellees paying costs in this court.

BURKE vs. ERWIN'S HEIRS.

**APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT OF THE
 PARISH OF IBERVILLE.**

The amount claimed, and not the amount of the judgment, determines the right of appeal.

The signature of the appellant to the appeal bond, is not essential.

The omission of some of the defendants to appeal, cannot affect the right of the others to do so.

The plaintiff claims of the heirs and legal representatives of the late Joseph Erwin, according to their virile shares, the sum of five thousand dollars, as a compensation on a *quantum meruit* for his professional services as attorney at law, rendered to the estate of the deceased.

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Two of the defendants did not appear. The others pleaded the general denial.

On the trial, Clement, one of Erwin's executors, testified that the plaintiff was retained by the executors, as the sole counsel in all the legal business of the estate, and in that capacity he appeared in all the suits mentioned in his account on file, in this suit. No fees were fixed, the plaintiff said they should be reasonable, and it was understood, though not expressed at the time, between plaintiff and the executors, that they would give him one half of their commission for his legal advice, and in consideration of this, he was to charge at a low rate for his services to the estate.

Five members of the bar testified that it was impossible to specify precisely the value of the plaintiff's services in the suits, because the particulars were not fully disclosed, but they concurred in estimating the whole amount of the services, at a sum greater than that allowed by the verdict of the jury.

The plaintiff excepted to the refusal of the judge *a quo*, to permit a witness to be asked if it were not within his knowledge, that the plaintiff had been applied to by several debtors of the estate to a large sum, to act as their counsel. The defendants excepted to the judge's refusal to admit a document, to prove that in a certain case the full amount of the judgment in favor of the estate had not been received on the sheriff's sale under execution.

The cause was submitted to a jury, who returned a verdict for the plaintiff for one thousand four hundred and thirty dollars, being the one half of the whole amount due by the succession, to be paid by the defendants according to their virile shares. Judgment was rendered accordingly, but without prejudice to the plaintiff's right against the defendants, who had not appeared. The largest virile share of any

EASTERN DIS. defendant, was two hundred and thirty-eight dollars and
March, 1894. thirty-three and a half cents.

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A motion by defendants for a new trial, on the usual grounds, that the verdict was contrary to law and evidence, was overruled.

The defendants, who had appeared, filed their petition of appeal. Their names were all stated in the appeal bond, but five of them omitted to sign it. There was but one surety on the bond. The penalty of it was two thousand five hundred dollars, the sum ordered by the judge.

Davis, for plaintiff and appellee, moved to dismiss the appeal on the following grounds:

1. Judgment is against each of the defendants for his virile share, and the virile share of no one defendant exceeds three hundred dollars.

2. The reversal of the judgment as to one, would not operate a reversal as to any other.

3. Some have not appealed: such cannot be benefited or injured by the results of this appeal.

4. The bond is insufficient: no one heir is responsible upon the bond, unless as security, except to satisfy the judgment against himself. He should give security, therefore, for one half more than his own judgment.

5. If the heirs are responsible as securities for each other, the bond is bad, because all the parties to it have not signed, and the others are consequently not held.

6. The security, Joseph Thompson, is not held, because all the parties named in the bond have not signed; he signed upon the faith of all, not of a part.

7. If the bond is insufficient as to one, and it must be for the party who has not signed. The whole bond is bad, if the appeal is one and integral, and the appeal must be dismissed.

8. If the appeal is not one and integral, the court is without jurisdiction, because the amount of one judgment cannot be added to the amount of another to give this court juris-

diction, when the defendants are neither jointly, nor jointly and severally, liable for the amounts of the different judgments. Joseph Thompson, signs as a security for all the defendants in one bond. This is bad, because all the defendants have several, not joint liabilities, and one surety cannot be received in the same bond, to different and several obligations.

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9. The parties, defendants, are joined in the court below, in the application for a new trial. If any one had not joined, he would have been concluded by the verdict and judgment. Therefore, the appeal is not joint, but several. *Code of Practice, articles 570, 575.* As to that part of the article which relates to a judgment for a specific sum, *art. 579, art. 874. Prevost and wife vs. Greig et al. 5 N. S. 87.*

10. The security in this case could not call upon any of the debtors for the whole amount of the bond.

MARTIN, J., delivered the opinion of the court.

The plaintiff claimed from each of the defendants, his virile share of five thousand dollars, alleged to be due him for professional services in the settlement of their ancestor's estate.

Two of the defendants did not appear, the others pleaded the general issue.

There was a verdict and judgment for the plaintiff, and the defendants appealed, after an unsuccessful effort to obtain a new trial.

A dismissal of the appeal was prayed, on the grounds that the virile share of none of the defendants amounted to more than two hundred and fifty dollars, on account of the insufficiency of the bond, which was not subscribed by all the appellants, and which was for too small a sum, and on account of the defendants not having appealed.

We are of opinion, the appeal ought not to be dismissed.

The plaintiff's is a joint claim for a large sum against several heirs, and the amount of the judgment, does not determine the right of appeal, which is governed by the amount claimed.

The amount claimed, and not the amount of the judgment, determines the right of appeal.

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The signature of the appellant to the appeal bond, is not essential.

The omission of some of the defendants to appeal, cannot affect the right of the others to do so.

The signature of the appellant to the bond is not essential, as he is bound by the judgment, more virtually than by the bond. The penalty of the bond, as fixed by the judge, is two thousand five hundred dollars, and the judgment is for one thousand four hundred and thirty dollars. The omission of some of the defendants to appeal, cannot affect the right of the others to do so.

On the trial, two bills of exception were taken, but as they were presented by the appellee, it is useless to examine them. No other question of law arises. The jury thought the claim of the plaintiff for the amount of their verdict, was sufficiently proved; the court declined granting a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

MON ET AL. vs. GARNIER.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF NEW-ORLEANS.

Where the functions of two executors are equal and undivided, each can claim one half only of the commission.

The legacy left to a co-executor, is evidence of the testator to remunerate this co-executor for his trouble, by the legacy, instead of the half of the commission he would otherwise have been entitled to.

Roman Mon, died on the 2d November, 1832, leaving a testament, in which he appointed John Garnier and Antonio Rivas, his executors, and left to the latter a legacy.

The testamentary executors, administered on the estate, and filed their final account, praying to be discharged.

In this account no commission was claimed by or allowed to Antonio Rivas, he having received a legacy.

John Garnier, the other testamentary executor, however, claimed the whole commission, amounting to twelve hundred and forty-two dollars and twenty cents, being two and a half per cent. on all the assets which came into the hands of the said executors.

To this claim of John Garnier, the mother and widow of the said Roman Mon, his sole legatees by universal title, filed an opposition, on the ground, that under the aforesaid circumstances, he was entitled only to half commissions, viz: six hundred and twenty-one dollars and ten cents.

The judge *a quo* sustained the opposition. The plaintiff appealed.

Mercier, for plaintiff and appellant.

Janin, *contra*, relied on the following points.

1. When the testator appoints several executors, they must rateably share the commission of two and a half per cent. *Civil Code*, art. 1676, 1678. But when a testamentary executor receives a legacy, he cannot claim the commission, to which he would otherwise be entitled, and it returns to the estate, *Civil Code*, 1679, because he is considered as being remunerated by the legacy, for the management of the estate. If then in such a case the commission of the executor, who is also a legatee, were to inure to the benefit of the other executor, the estate would pay twice for the same services.

2. It is believed, that our judicial system is the only one, which allows a commission to an executor. But the French, Spanish and English laws, view a legacy left to an executor, in the same light as ours, that is, as a reward for his services, and he loses it, if he refuses to act. 5 *Toullier*, 1 Febr. 93. *Duty of executors*, p. 164.

MARTIN, J., delivered the opinion of the court.

Garnier is appellant from the judgment of the Court of Probates, which allows him a commission of one and a fourth,

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per cent. only, as executor of the last will and testament of R. Mon Y. Fon, deceased.

Garnier and Rivas are mentioned as executors, and their functions are not divided by the will, in which a legacy is given to Rivas, who accordingly made no claim to any commission. The heirs opposed Garnier's claim to a commission of two and one half, and their opposition was sustained.

It does not appear to us that the Court of Probates erred. The *Louisiana Code*, allows to an executor or executors, a commission of two and a half per cent. *Louisiana Code*, 1676, 1678. But executors to whom a legacy is given by the will, are not entitled to any commission, unless the testator formally expresses his intention that to the legacy and commission be received. *id.* 1679.

Where the functions of two executors are equal and undivided, each can claim one half only of the commission.

The appellants having a co-executor, with equal powers, was entitled to his share of the commission, *i. e.* one half of two and a half, which is exactly what the judgment appealed from allows him.

The legacy left to a co-executor, is evidence of the testator to remunerate this co-executor for his trouble, by the legacy, instead of the half of the commission he would otherwise have been entitled to.

The legacy left to this co-executor is evidence of the testator, to remunerate this co-executor for his trouble, by the legacy, instead of the half of the commission he would otherwise have been entitled to. This circumstance does not in the least add ought to the trouble of the appellant, nor consequently to his claim for compensation.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

MINOUE ET AL. *vs.* THIBODEAUX'S WIDOW ET AL.EASTERN DIS.
April, 1834.APPEAL FROM THE COURT OF THE SECOND DISTRICT, THE JUDGE THEREOF
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Of all questions, there is perhaps none on which the verdict of a jury is entitled to more weight, than that which relates to the value of waste land in the parish.

On the 19th day of December, 1826, the plaintiffs sold by public act, to Henry S. Thibodeaux, in consideration of two hundred dollars paid by him, all their right and title to a lot confirmed under the act of Congress, situated on bayou Terre Bonne, containing six hundred and forty acres, and marked number four hundred and nineteen, and to Alexis Le Jeune nineteen arpents in front, on said bayou, in Le Jeune's possession, the title to which has also been confirmed, and which is one-half of the lot numbered six hundred and sixteen.

The plaintiffs brought their action in September, 1828, and sought to set aside this sale, on the ground of error, fraud and lesion. They also claimed five hundred dollars, as damages for the use and occupation by the defendants.

The widow of the vendee pleaded the general denial. Alexis Le Jeune, averred that he and Pierre Minoué, the father of one of the plaintiffs, purchased the title to the tract of land from Jean Dupré; that this land was afterwards confirmed in the name of Pierre Minoué, the son, by agreement between his father and Le Jeune; that immediately after the sale from Dupré, Minoué, père and respondent, divided the land, the former taking possession of the upper twenty arpents front of said land, and the latter of the lower twenty arpents; Le Jeune had since retained possession of his share. He also alleged that at a meeting of the heirs and representatives of Minoué, père, on the 16th day of June, 1823, Thibodeaux then being present, he (Thibodeaux) concurred with the others in the passage of an act by which Le Jeune's title to the lower half of said tract was expressly recognised and confirmed. He added the general denial.

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The defendants amended their answers, by pleading title in themselves by prescription.

The cause was submitted to a jury who could not agree on a verdict.

On the second trial the testimony taken on the first, was by consent admitted, subject to legal exceptions.

The plaintiffs gave in evidence the act of sale of the lands in question, the certificates of confirmation, the surveys, dated 18th June, 1826, and the testimony of Legendre taken under a commission, with the exception of his answers to the fifth, sixth, seventh and eighth interrogatories, tending to prove the execution of the said act of sale through fraud and error, induced by the defendants, to the rejection of which answers by the judge *a quo*, the plaintiffs excepted. The only objection at the trial to this testimony of Legendre's, was that it could not contradict the act.

Legendre was a witness to the execution of the act, proved it was read before signing; that it was passed at the house of vendee; that the sale was made by Madame Minoué of a tract of land, of which he did not remember the measurement, for the sum of two hundred dollars. Witness is the nephew of Madam Minoué, and the curator of her three children.

Cazeaux swore that lot number four hundred and nineteen was worth in 1826, two thousand dollars, and half of number six hundred and sixteen, was then worth one thousand dollars, according to his sale of an adjoining tract of the same quality, but with less low land, for five thousand dollars. At auction witness thought number four hundred and nineteen could not have been sold at all in 1826, but its value was five hundred dollars, the other tract was worth about the same sum. Lands on that bayou then sold from two to one hundred dollars the front acre, and were of less value lower on the bayou. Lands were then of no fixed value in the neighborhood. They were sold at every price, some at twenty-five dollars, others at one hundred dollars.

Roddy estimated lot number four hundred and nineteen as worth two thousand dollars, the other lot as worth very little, having no cypress. He was not there in 1826.

Watkins, who resided on the bayou, estimated the land worth in 1826 one hundred dollars the front acre, and fifteen dollars the superficial acre. Part of that land sold in 1826 for one hundred dollars an arpent front. There was then no fixed price of lands in the vicinity.

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Delaporte testified that lands in this vicinity, though their value varied according to quality and location, had then no fixed prices; and that uncleared lands on this bayou might be had at two or two and half a dollars the superficial acre.

Ellis, the brother-in-law of one of the defendants, swore that lands were then fluctuating in value on this bayou, and that he sold in that year one thousand acres of as good land as any in the parish, for one thousand two hundred and fifty dollars.

The plaintiffs objected to proof of value of lands, other than those set forth in the petition, and also that lands in the same parish had then no fixed value offered to prove by comparison the value of the lands in dispute. The evidence was admitted, and they excepted.

The defendants had a verdict, and a new trial having been refused, the plaintiffs appealed.

Nicholls and *Wheeler*, for plaintiffs and appellants.

1. The court below erred in refusing the evidence of *Legendre* and others, going to the jury to establish fraud, on the part of the purchasers of the lands in question. *Sopes vs. Griffin's Executor*, 5 *Martin's Rep.* 145. *Croczel's Heirs vs. Gandet*, 6 *ibid.* 524. *Fonque's Syndic vs. Vignaud*, 6 *ibid.* 423. *Terrel's Heirs vs. Croper*, 9 *ibid.* 350.

2. The court erred in permitting evidence to go to the jury, to show the value of other lands in the parish, and that other lands had no fixed value, situated in remote and unsettled parts of the parish, in order to show by comparison the value of the lands in question.

3. The verdict of the jury and judgment of the court below, are contrary to law and evidence, as lesion is clearly

EASTERN DIS. established by every witness examined on trial. *La. Cod e*
April, 1834. arts. 1851, 1866, *inclusive.*

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4. The whole evidence being before this court, there is no necessity for remanding the cause for a new trial.

J. Porter, contra, contended as follows.

1. The question for the court to decide, is not one of error or fraud, for there is no evidence of any; but whether there be evidence of lesion sufficient to induce this court to set aside the verdict of a jury, and the judgment of the District Court.

2. The parol evidence introduced by the plaintiffs, would in itself be sufficient to justify in its fullest extent, the finding of the jury; because it is contradictory, and establishes, if any thing, that waste lands, at the time of the sale, in that part of the country, had no fixed value. It is true, witnesses say, that they estimate the land in dispute when sold, at such a sum, as might perhaps be sufficient to establish lesion, were it not that they offer such explanations as reduce their testimony to nothing. Pierre Cazeau, estimates the tract marked A, at two thousand dollars, and the half of tract marked B, at one thousand dollars. On his cross examination, however, he says that he forms this opinion, because he sold a tract of land of the same *quality* for five thousand dollars. The court, however, will remark, that he says nothing about the *quantity* of land contained in the tract he sold. It may have been five times or ten times as large, as both the tracts now sued for, put together. And notwithstanding the *quality* was the same, it leaks out, that it had less low land than the tracts now in dispute. He also declares that lands were then sold at every price, and that there was no fixed value for land in that part of the parish.

3. The attempt to form an estimate of the value of land, with a view to establish lesion, by proving what other persons sold tracts for, in the same neighborhood, is the weakest kind of evidence, and liable to the greatest abuse. It is only

where something like a market price exists, as in case of houses, town lots improved, or plantations under cultivation, that the value of property can be established, under the meaning, and for the purposes contemplated by *articles 1854 and 1855 of Civil Code*. Waste lands may sometimes have a determinate value, susceptible of being proved; but clearly, the attempt at such proof has been a total failure here.

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4. But if the price at which lands of a like quality sold for at the time, is to be taken as a standard or scale, by which the value of the land in dispute must be measured, then the court will find that lands of as good a quality sold, about that period, at a much lower rate, and consequently such testimony is rebutted and destroyed.

5. Delaporte bought as good lands for two dollars and twenty cents, at seven years credit, on bayou Little Terre Bonne, which may probably be considered as low as the land in dispute. In 1826, Tanner bought land at sixteen cents per acre, which was at least six cents per acre lower than the sale made by plaintiffs to defendants, and a tract of one thousand six hundred acres for three hundred and fifty dollars, which was also some cents lower.

6. The court will also perceive that Madam Minoué, one of the plaintiffs, acknowledged that the land for which the defendant, Alexis Le Jeune, is now sued, was really his property.

7. As regards the testimony of François Legendre, it was property rejected by the court. The commission was directed to the parish judge of Lafourche Interior, and was executed by a justice of the peace.

8. But even supposing it had been legally executed, the judge *a quo*, did not err in rejecting it. The object evidently was under the allegation of fraud, to introduce evidence establishing a set of facts contradictory to the facts established by the bill of sale. Fraud was alledged, and parol evidence might perhaps be legally introduced to prove such fraud; but the witness in his answer to the second interrogatory, discloses a fact, which if answered *viva voce*, in open

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court, would have been a sufficient reason for the court to exclude the other questions propounded. It would be strange indeed, if a witness were permitted first to prove that the deed complained of, was read to the parties before signing, and afterwards to prove, that the said parties did not know what they were signing. There is nothing in the testimony of Legendre, even had it been admitted, which would have changed in aught the finding of the jury; nor is there in truth any thing in the cases cited, that has bearing on this point. In cases of this kind, this court has frequently decided, that it is the province of the jury to decide.

Indeed I do not recollect but a single case in which the court granted a new trial, when the verdict of a jury had negatived the charge of fraud. I mean the case of *Brandt and Foster's syndics vs. Christopher Adams*. But there the evidence was so strong, so irresistible in its character, that the court could not hesitate.

Nicholls and Wheeler, for plaintiffs and appellants, in reply.

1. The decision of this suit entirely depends on a single fact, viz: was or was not the land sold, worth at the time of sale, more than four hundred dollars. The fact is proven by every witness sworn on the trial; though, as stated by some of the witnesses, that the price of land of that description fluctuated, yet, with all the fluctuations, they all concur in saying the land was worth more than four hundred dollars.

2. The only question, therefore, is as we have stated, what was the *value* of the land? what was it worth? That fact ascertained, the application of the law to the case admits of no difficulty. The appellants contend, that no matter how fluctuating may be the price, no matter how depreciated may be the value of such land, that value, once established, is the only test of the existence or non-existence of lesion.

MARTIN, J., delivered the opinion of the court.

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vs.
JENFREAU.

The plaintiffs are appellants from a judgment against them on a claim to have a sale of land set aside, on account of error, fraud and lesion.

Their counsel, who, at first had drawn our attention to two bills of exceptions, have informed us that the decision of this case depends upon a single fact, viz: the value of the land, at the time of the sale. In this view of the case, the counsel for the defendants and appellees has concurred.

The case was submitted to two juries; the first did not agree on a verdict, the second found one against the plaintiffs. The testimony is, in our opinion, somewhat confused and contradictory. The district judge refused to allow a new trial. Of all questions, there is perhaps none on which the verdict of a jury is entitled to more weight, than those which relate to the value of waste land in their parish. It is not suggested that if the case was remanded to a third jury, clearer evidence could be adduced; and though that before us may preponderate in some degree in favor of the plaintiff, yet does not sufficiently do so to justify us in setting the verdict aside.

Of all questions, there is perhaps none on which the verdict of a jury is entitled to more weight, than that which relates to the value of waste land in the parish.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

LALANDE vs. JENFREAU.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

The circumstance that an award of amicable compounders has been made, which, by agreement of the parties, was to be final and become the judgment of the court, does not authorise the dismissal of the appeal.

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This action was brought to settle a co-partnership. The plaintiff avers that by an act passed before Felix de Armas, notary public, on the 21st day of December, 1830, the plaintiff and Augustine Jenfreau formed a co-partnership for the purpose of refining sugar, and making the same into loaves.

That by the terms of said agreement of partnership, the same was to expire on the 1st of August, 1831, but that at the expiration thereof, the same was by mutual consent continued until the 10th of May, 1832.

That by just settlement of the affairs of said partnership, the same would be indebted to the plaintiff for advances made, expenses paid, sugars purchased and other charges, in a balance of two thousand eight hundred eighty-six dollars and seventy-one cents.

The general issue was pleaded.

It was agreed by the parties "to refer this case to two distinct referees, one to be chosen by each of us, as said referees to act as amicable compounders, and their award to be final as to all matters of difference between us, and to be entered up as the judgment of the court in said suit; whose award shall in that suit be binding."

"It is further agreed that said referees are to have access to all the books, papers and accounts relating to the subject matter, and to hear testimony of the whole without any judicial formality whatever, and that each party shall furnish his accounts and evidence at such time and place as the referees shall designate, or in default thereof, the said referee shall proceed to determine the matters referred to them *ex parte*."

The referees reported the defendant indebted to the plaintiff in the sum of one thousand five hundred eighty-eight dollars and seventy cents. The homologation of this report was opposed on several grounds, in support of which, the record shows no proof adduced.

The award was homologated, and judgment rendered in pursuance of it.

The defendant appealed.

Conrad, for plaintiff and appellee, contended:

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1. That the appeal should be dismissed with costs and damages. This court cannot examine the merits of the case, inasmuch as by the agreement of the parties, the award of the arbitrators was final, and became the judgment of the court.

2. If this exception be overruled, then the plaintiff avers there is no error in the judgment appealed from, and it should be confirmed with costs, except inasmuch as it condemns the plaintiff to pay costs; and he prays for damages as on a frivolous appeal.

3. The court clearly erred in condemning the plaintiff to pay costs. The award of the arbitrators, which, by agreement, was to be the judgment of the court, is silent on the subject of the costs, and finds a balance for the plaintiff; of course the defendant should pay costs. *Code of Practice*, art. 549.

4. The appeal was evidently for delay only. See the points filed by the defendant in opposition to the homologation of the award, and the total absence of any ground for a reversal.

Soulé, contra.

MARTIN, J., delivered the opinion of the court.

The plaintiff and appellee has prayed that the appeal be dismissed with costs and damages, because this court cannot examine the merits of the case, inasmuch as by the agreement of the parties, the award was final, and to be the judgment of the court.

This is not, in our opinion, a ground of dismissal, because on the return of the award, either of the parties might have filed exceptions thereto, as if it was not made within the legal period, &c.

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The circumstance that an award of amicable compounders has been made, which, by agreement of the parties, was to be final and become the judgment of the court, does not authorise the dismissal of the appeal.

The answer to the appeal, prays that the judgment be annulled, so as to reverse that part of it which charges the plaintiff with costs.

The record shows that on the service of a rule on the defendant to show cause why the award should not be homologated, the defendant filed exceptions, charging misconduct and particularly in the arbitrators, which he in no way supported, and judgment was given according to the award, in favor of the plaintiff, who were ordered to pay costs.

It is apparent that this condemnation of the costs is illegal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the plaintiff recover from the defendant the sum of one thousand five hundred eighty-eight dollars and seventy cents, with costs in both courts.

CLEGG ET ALS. vs. ALEXANDER.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

It is a legal presumption, which may be rebutted, that a bill of exchange is accepted on the existence of funds belonging to the drawer, in the hands of the acceptor or that he later is indebted to the former.

In an action by the acceptor, against the drawer of an accommodation bill of exchange; proof must be made of the handwriting of the drawer; that the bill was put in circulation after acceptance, and payment was made to a person authorised to demand it.

An action by the acceptor against the endorser, cannot be sustained without proof, that the acceptance was made purely for the accommodation of the drawer.

This is a suit brought by plaintiffs against defendant, by attachment, the parties residing respectively in England and Ireland. The plaintiffs allege themselves to be accommodation acceptors for defendant, the drawer of a bill of Exchange for six hundred pounds sterling, drawn at Liverpool on the 28th January, 1831, at three months from date, and which fell due 1st of May. There was proof of the signatures, and that the bill was in circulation. The evidence that it was accepted for the accommodation of the defendant rests on three letters written by him; the first addressed to George A. Brown, who is proved to be a member of the plaintiffs' firm; the other two were addressed to the partnership.

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The following extract is taken from the third letter, dated at Liverpool, 20th April, 1831, and addressed to Clegg, Brown & Co., at Manchester.

"GENTLEMEN:—I am in receipt of your esteemed favor of 16th instant, and hasten to give you an extract from Brown, Blandin & Co's. last advice, dated Tampico, January 1, 1831. 'We remitted a short time ago to William and James Brown & Co., Liverpool, for your account, six hundred and sixty pounds. After covering themselves for the advances made by them for your account, on your shipments to us, the balance will be at your disposition, of which please take notice.' Of this remittance on my account to William and James Brown & Co., I have in no way availed myself, calculating it would go to cover the cash advance, say three hundred and eighty-five pounds, and to meet the further sum of six hundred pounds, due 1st May; so that of course placing you in funds for six hundred pounds, came not into my calculations, for this or the succeeding month, particularly as the goods were shipped to Tampico, on the understanding with your Mr. G. Brown, that the one half of the amount of the invoice should be remitted for, on arrival of the goods; however, could I at this short notice do any thing the way of remitting you funds, would be most happy; but my hitherto small means have been cramped by recent losses, of which I made you aware when in Manchester. Were this

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not the case, and had I funds at my command, would instantly meet your views."

"According to agreement, I cannot draw for three hundred pounds, but I have already received one hundred and eighty-five pounds, more than I could demand."

The second letter corroborates the statements of the third relating to the bill in question.

The judge *a quo* considered the testimony insufficient to sustain the allegation that the bill was accepted for the accommodation of the defendant, and a judgment of non-suit was entered. The plaintiff appealed.

Leigh, for plaintiffs and appellants contended:

That the judge *a quo*, erred in giving judgment as in case of non-suit against the plaintiffs, because it was proved on the trial that the plaintiffs were entitled to a judgment for the sum demanded by them, they having accepted the bill of exchange referred to in their petition, for the accommodation of the defendant, who is bound to indemnify them, it being in evidence, that they, as accommodation acceptors, paid the bill when it fell due.

Strawbridge, contra.

MATHEWS, J., delivered the opinion of the court.

This is a suit by the acceptors of a bill of exchange, against the drawer. The plaintiffs allege that it was accepted without any funds or effects of the drawer in their hands and purely for his accommodation. That they paid the bill at maturity, after it had been put in circulation, and the defendant having failed to refund to them the amount thus paid for his benefit, the present suit is brought to recover it. Judgment was rendered for the defendant in the court below, from which the plaintiffs appealed.

It is a legal presumption which may be rebutted, that a bill of exchange is accepted on the existence of funds belonging to the drawer, in the hands of the ac-

It is a legal presumption that a bill of exchange is always accepted, on the existence of funds belonging to the drawer, in the hands of the acceptor, or that the latter is indebted to the former; consequently the acceptor cannot legally make any claim against the drawer on account of having paid the

bill in an ordinary case. There is, however, an exception to this general rule, when the acceptance has been made without funds in hand, but purely for the accommodation and benefit of the drawer. In an action by the acceptor against the drawer, founded on a bill of this kind, to authorise a recovery, proof must be made of the hand writing of the drawer; that the bill was put in circulation after acceptance, and payment to a person authorised to demand it, &c.

The evidence in the present case, as assumed by the court below, clearly establishes the facts of drawing by the defendant, of the bill having been put in circulation, after acceptance and payment by the acceptors to a person authorised to demand it. But the main fact, without which the action cannot be supported, the acceptance having been made, purely for the accommodation of the drawer, seems not to have been proven to the satisfaction of the judge *a quo*, who tried the cause without the intervention of a jury. To establish this fact several letters from the defendant to the plaintiffs are relied on. They are three in number; the first has little bearing on the question. From the tenor of the two last it appears that the defendant was in the habit of shipping goods from England to Mexico, consigned to Brown, Blandin & Co., of the latter place. To enable him to make those shipments, the second letter raises a presumption that William and James Brown, of Liverpool, were in the habit of making advances of money to be refunded on the return of proceeds, &c., they, however, declined an arrangement of that nature, at the time the bill in question was drawn on the plaintiffs, and was evidently accepted to supply the deficiency occasioned by the refusal of the house in Liverpool to make the advance which the necessity of the defendant required. According to the evidence afforded by this letter, and the last one dated in April, 1831, we fully believe that the acceptance was made for the accommodation of the drawer, and that he calculated to refund the amount thus advanced to him, by means of remittances expected from Mexico, no part of which were ever appropriated to that purpose, as is clearly shown by the last letter, which although expressed in terms

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ceptor, or that the latter is indebted to the former.

In an action by the acceptor, against the drawer of an accommodation bill of exchange; proof must be made of the hand writing of the drawer; that the bill was put in circulation after acceptance, and payment was made to a person authorised to demand it.

The action by the acceptor, against the endorser, cannot be sustained without proof, that the acceptance was made purely for the accommodation of the drawer.

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somewhat vague and indefinite, is in substance an acknowledgment to the plaintiffs of the debt claimed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled. And it is further ordered, adjudged and decreed, that the plaintiffs and appellants do recover from the defendant and appellee, the sum of two thousand six hundred and sixty-six dollars, with interest at the rate of five per cent. per annum, from the 10th of September, 1832, the day of the judicial demand, until paid, with costs in both courts.

ROBBINS, SYNDIC, &c., vs. LEVERICH ET AL.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Where the insolvent and another person were both retail grocers, and the articles were received in small quantities from the insolvent, and such as grocers are in the habit of interchanging for the accommodation of their customers; *held* that such transactions in the usual course of business, are not liable to be annulled as fraudulent under the insolvent law.

A party to the suit, made a witness by an application to his conscience, cannot complain of being judged by such answers as he chooses to give.

Where the question propounded to the defendant, was in substance, whether he received directly or indirectly, the transfer or assignment of a particular debt; the answer which negatives only the transaction directly between the insolvent and the defendant personally, is insufficient.

A transfer is fraudulent, made by an insolvent one week before his surrender of debts due him, so as to secure or novate a debt of the insolvent to the transferee.

This action was brought by the syndic of the creditors of James Greenleaf, to recover of the defendants the sum of

one thousand three hundred and forty-seven dollars and fifty-nine cents.

The petition showed that on the tenth day of June, 1829, James Greenleaf applied for the benefit of the insolvent laws of this state, being then in insolvent circumstances, and that he had been in such circumstances and had actually failed many months previously. That W. & J. Leverich, knowing that Greenleaf was insolvent and claiming to be his creditors, obtained possession from said Greenleaf, of certain goods and merchandise, as tea, raisins, prime pork, claret wine, and other goods specified in the account, making a part of the petition.

That said W. & J. H. Leverich also under the same circumstances, caused and procured said Greenleaf to transfer and assign and deliver to them accounts and notes due him by other persons, and the proceeds of goods shipped by Greenleaf. That said goods, accounts and notes were so transferred and delivered between April 14th, 1830, and June 4th, 1830 inclusive, during all which time said Greenleaf had actually failed, and had not property sufficient to pay his debts, which circumstances were then well known to them. That said property, thus received by defendants, amounted to the sum of one thousand three hundred and forty-seven dollars and fifty-nine cents. That the same was the common stock of the creditors of said Greenleaf, and that the transfer of the same, or whatever other contract or mode by which the same was so received by said W. & J. H. Leverich, was illegal, being to the injury of the creditors of said Greenleaf, and intended to give a preference to said defendants over the said creditors, no consideration for the same having been given at the time by them to said Greenleaf. That the property ceded by him will not be sufficient to pay the debts due by him.

The defendants answered, that they denied all and each of the allegations in the petition. That if they ever did receive the goods, monies, notes or orders, at the dates and times, and in manner and form, as is in the petition alleged, then that the same were received in the usual course of business, in

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EASTERN DIS. good faith, and in payment of a just debt due them by
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To a supplemental petition the plaintiff subjoined twelve interrogatories propounded to the defendants, relating to the transfer of particular goods, notes, accounts and orders, by the insolvent or *some one for him*, to the defendants, at a period when they knew him to be insolvent.

The defendants on the 12th of January, 1831, filed their exception to the interrogatories propounded to them, because none of the said questions were pertinent to the issue, and moreover the same were not in conformity to the dates, circumstances and allegations in the petition filed by plaintiff.

On the first of February following, they answered the interrogatories; no decision of the court having then been pronounced upon the exception filed. They admitted the transfer of the goods, but denied that they had received several of the notes, orders and accounts in question *from the insolvent*. They did not know whether the insolvent was able to pay his debts when the transfers were made, which they averred were all made in the usual course of business and in payment of a just debt.

On the 19th of the following April, the syndic obtained a rule on the defendants, to show cause why those parts of their answers to the interrogatories should not be stricken out, which state that the transactions referred to were made in good faith, in the usual course of business, and in the payment of just debts; and why the exceptions of the defendants should not be overruled.

On the return day of the rule the court refused to strike out those parts of the answers, and the plaintiff took his bill of exceptions. The plaintiff objected to them on the ground that they were not facts, but inferences or matters of law.

James Greenleaf, testified that in December, 1829, he considered that he was doing a good business, and he was in good credit and considered himself as doing a good business till within a few days previous to his failure. That the transactions between witness and defendants were all fair

business transactions, and in the usual course of business. **EASTERN DIS.**
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There were no goods transferred by witness or payments made by him to the defendants, in order to give them any preference over his other creditors.

That the defendants and he had business together as grocers before his failure, and were in the habit of buying goods from one another, and selling goods to each other, and had a running account between them. The account ran from the month of December, 1829.

The jury returned a verdict in favor of the plaintiffs for one thousand two hundred and twenty dollars and seventy cents. This verdict was set aside, a new trial granted, and a second verdict found for the plaintiffs for one thousand one hundred and thirty-two dollars and ninety-one cents. A new trial having been refused, judgment was rendered upon this verdict, and an appeal therefrom taken by the defendants.

Maybin, for plaintiff and appellee.

1. The court below was correct in overruling the objections to the evidence made by the defendants. (See their bills of exceptions.)
2. The verdict of the jury was correct, both as to the law and facts.
3. Two juries have rendered verdicts for the plaintiff, which should be conclusive on this court, in a case like the present.
4. The court below erred in not striking out parts of the answers of the defendants, as is stated in the bill of exceptions of the plaintiff.

Carleton and Lockett, contra.

BULLARD, J., delivered the opinion of the court.

The plaintiff sues, as syndic, to annul certain contracts made by the insolvent with the defendants, within the three

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Where the insolvent and another person were both retail grocers, and the articles were received in small quantities from the insolvent, and such as grocers are in the habit of interchanging for the accommodation of their customers, held that such transactions, in the usual course of business, are not liable to be annulled as fraudulent, under the insolvent law.

A party to the suit made a witness by an application to his conscience, cannot complain of being judged by such answers as he chooses to give.

months preceeding his surrender, as having been made in fraud of the creditors. The acts complained of as prejudicial to the rights of the creditors, are the alleged delivery of certain goods and merchandise from time to time, and the transfer of certain notes and other evidences of debts, to secure a debt due to the defendants, and to give them an unjust preference over other creditors.

It appears that the insolvent and the defendants were engaged in the same kind of trade, that of retail grocers. The articles received by the defendants, from time to time, in small quantities, were such as grocers are in the habit of interchanging for the accommodation of their customers. The court is of opinion, that such transactions, in the usual course of business, are not liable to be annulled as fraudulent, under the insolvent laws of the state. The jury seems to have been of that opinion, and we concur with them. We shall, therefore, confine our attention to the transfer of certain debts, between the 28th of May and the 4th of June, 1830, the insolvent's bilan having been filed on the 10th of the latter month.

Interrogatories were propounded to the defendants relating to the transfer of these claims. They excepted to the interrogatories, as not pertinent to the issue, and not in conformity to the dates, circumstances and allegations in the petition. Without calling the court to decide on the exceptions, the defendants proceeded to answer on oath. Some were answered fully, but others relating to the transfer of the debts, are only partially answered, and the exception first made, was reserved and reiterated as to parts of the interrogatories not answered. The court overruled the exceptions, and the defendants went to trial without taking a bill of exceptions, and without making further answer. We cannot inquire into the correctness of the opinion of the district judge, in overruling the exceptions. The defendants might have answered more fully afterwards, or might have taken a bill of exceptions. Having been made witnesses, by an application to their own consciences, they cannot complain of being judged by such answers as they have chosen to give.

By the sixth interrogatory, they were asked whether Greenleaf, or some one for him, did not, on or about a particular day, transfer, assign, or deliver to them or their order, or to some one for them, or on their account, an account or debt for one hundred and sixty-six dollars and seventy-four cents, due said Greenleaf, by N. Barlow & Co.?

Their answer is, that *Greenleaf* did not assign, transfer, or deliver to these respondents, on or about that day, an account or debt for one hundred and sixty-six dollars and seventy-four cents, due by any such persons as R. Barlow & Co. This is not a full answer to that branch of the interrogatory. The question was in substance, whether they received, directly or indirectly, the transfer or assignment of such a debt. The answer negatives only the transaction, directly between the insolvent and the defendant personally.

Similar partial answers are given to the seventh and eighth interrogatories, relating to other claims alleged to have been transferred. Even those parts of the interrogatories, clearly susceptible of a direct and categorical answer, are not fully answered.

The ninth and tenth interrogatories, are answered in the affirmative, but the defendants go on to say, that the draft was given and the note transferred "*in the usual course of business, in good faith, and in payment of a just debt, due by said Greenleaf to the respondents.*" They admit, therefore, that on the 3d and 4th of June, they were creditors of Greenleaf, and that their claim was either secured or novated, by taking a draft at six months, and accepting the transfer of a note, which had about two months to run. This does not appear to the court one of those transactions in the usual course of business, on payment of a first debt in money, which are spoken of in article 1981 of the Code, as not voidable under the insolvent laws of the state. One week before the surrender, the defendants were creditors; they were not set down as such on the schedule, and the debt had been provided for, not by a payment in money, but by assignments of debts due to the insolvent, which, independently of his transaction, would have gone into the mass. We think

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Where the question propounded to the defendant, was in substance, whether he received directly or indirectly, the transfer or assignment of a particular debt; the answer which negatives only the transaction directly between the insolvent and the defendant personally, is insufficient.

A transfer is fraudulent, made by an insolvent one week before his surrender, of debts due him, so as to secure or novate a debt of the insolvent to the transferee.

EASTERN DIS. this is giving a preference to one creditor, which is reprobated
April, 1834. by law. 3 *Martin*, 270. 4 *Louisiana Reports*, 247.

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Whether the defendants knew, at the time of these transactions, that the insolvent was unable to pay all his debts, was a question left to the jury, and which they have found against the defendants. The evidence on that point is not so unequivocal as to enable us to say, that the jury was manifestly wrong, and we cannot disturb the verdict.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

CONWAY vs. BORDIER ET AL.

APPEAL FROM THE SECOND JUDICIAL DISTRICT.

It was agreed that a certain tract of land belonged to one of the contracting parties, who had given the others a good and valuable consideration for the same, which the others acknowledged to have received. *Held* this is not a contract of sale, there being no price certain and fixed by the parties.

The Supreme Court cannot give judgment against a warrantor cited in the cause, who has not answered, and against whom judgment by default has not been taken.

This action was instituted to recover several lots of ground near the town of Donaldsonville, which the plaintiff alleges are her special and individual property, as will appear by an act of partition between her and the heirs of William and Elizabeth Conway, of whom she was one. By a judgment of separation of property rendered by the court, between her and her late husband, Robert Lawes, the

property now sued for, among other things, was decreed to belong to her. It is now possessed by the defendant, who refuses to deliver it up, and she sues for possession and rents.

The defendant denies all the allegations of the petition; avers that he is the rightful owner of the property in dispute; that he holds it from one Jacques Riviere, who purchased it from the said Robert Lawes, who holds it by purchase under the act of partition referred to in the plaintiff's petition.

The clause of the agreement referred to, under which both parties claim, is set out at length in the opinion of the court.

The judge *a quo* considered the agreement to be a contract of sale, and rendered judgment for the defendant.

The plaintiff appealed.

Nicholls and *J. Seghers*, for the plaintiff and appellant, contended that:

1. The act referred to was a partition among the heirs of Conway, and not a sale to Lawes. *Martin's Rep.*, 443, *Westoven vs. Aime*.

2. Lawe's action was brought as agent of his wife, and in no other capacity. The ostensible and avowed object was to divide the property in kind.

3. The court below erred in refusing to permit the question asked the witness; it did not go to contradict the act, but explain the document; a valuable consideration was acknowledged, and the appellant only sought to know in what it consisted.

4. The ratification by the wife, proves the agency of the husband, and would have been an act of superogation, had they acted in their own name, and for their own benefit.

5. An act which puts an end to joint ownership, is partition. *Civil Code*, art. 1440. *Paudectes Françaises*, vol. 7., p. 386, 377.

Roselius, contra.

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BULLARD, J., delivered the opinion of the court.

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The plaintiff sues for a tract of land, which she alleges that she inherited from her mother, and was assigned to her as a part of her inheritance, by a partition made by the heirs among themselves, extra-judicially. The defendant sets up title under a sale by the former husband of the plaintiff, R. Laws, to Rivière, and by Rivère to him; and insists that the instrument of writing executed by the heirs, principally for the purpose of severing their joint interest, was in fact, as relates to the land in controversy, a sale to Lawesin his own right, and not as is contended by the plaintiff, merely a partition. The case therefore turns on the construction of that instrument.

William and Elizabeth Conway left four heirs, of whom two were daughters and two sons. The two sons and the husbands of the daughters, on the 10th of June, 1819, executed the writing in question, under private signature. The parties recite, that as heir of Conway, they hold certain lots of land in common, their wish is to divide the property among themselves, so that each may receive a separate and distinct title to what belongs or should belong to him of said property. They then proceed to assign to each other certain lots of land by numbers, together with certain ground rents. Next follows the clause, the legal construction and effect of which, we are called on to examine. "And, whereas, the said Faubourg Conway is situated on the front of a tract of land owned by said William Conway, consisting of two acres front, with the depth of forty, and, whereas, twenty acres deep of the back part of said tract was sold to Walker Gilbert, deceased, now it is agreed and stipulated expressly by the parties, that all the remainder of said tract belongs, in full and absolute right, to the said Lawes, his heirs and assigns, &c., to wit: all the portion of it which lies between the part sold to said Gilbert, and the cross street, &c., the said *Lawes having given the other parties a good and valuable consideration for the same, which, it is acknowledged, is received.*"

In 1829, the present plaintiff, together with her sister, with the concurrence of their husbands, went before the parish judge of the parish of Ascension, and declared, that having been made acquainted with the above act of agreement, they were satisfied with and bind themselves to have the said agreement executed conformably to the stipulations therein contained. This act is signed by all the heirs.

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On a careful examination of this act of agreement, it has appeared to us to be in all its parts, substantially a partition among the co-heirs, and that no clause of it amounts to a sale of any part of the property to the husbands. In the act itself, they represent themselves as the husbands of two of the heirs, and the land now in controversy is expressly declared to have constituted a part of the common property. The two sons were competent to sell each his undivided share to Lawes, or to a stranger, but Maurin was without capacity to sell the share of his wife; and Lawes could not legally acquire the share of his. He could not validly contract with her; much less with himself, as representing her. If the present plaintiff could not legally sell to her husband, which we suppose will not be denied, it is not easy to perceive how she could be divested of her interest in the property sued for by her ratification of the act of her husband. As to one undivided fourth of the *locus in quo*, it seems to us clear that the title of the plaintiff has never been divested; she could not sell it to her husband if she had been disposed to do so. As relates to the other three fourths, we cannot concur in opinion with the court of the first instance, that the parties intended a sale to Lawes. It is true the parties acknowledge a *good and valuable consideration*, but the Code requires as of the essence of a sale, that there should be a price certain, fixed and determined by the parties. *La. Code, art. 2439.* The contract, therefore, is wanting in one of the essentials of a sale. The consideration spoken of may well have been the inequality of lots assigned to the co-heirs respectively by the previous donors of the same agreement. We are of opinion that the intention of the parties was, that the lot of land in dispute should be assign-

It was agreed that a certain tract of land belonged to one of the contracting parties who had given the others a good and valuable consideration for the same, which the others acknowledge to have received. Held this is not a contract of sale, there being no price certain and fixed by the parties.

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The Supreme Court cannot give judgment against a warrantor, cited in the cause, who has not answered, and against whom judgment by default has not been taken.

ed to Lawes, in right of his wife, as a part of her share in her father and mother's estate, and constituted consequently her paraphernal property.

With this view of the rights of the parties, we should have proceeded to give a final judgment in the case, but, on looking into the record, we find that the defendant's warrantor has been made a party, and has not filed his answer, nor has judgment by default been taken against him. It will therefore be necessary that the cause be remanded for further proceedings, as between the defendant and his warrantor.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and that the plaintiff recover and be put in possession of the tract of land described in the petition; and it is further ordered and decreed, that the cause be remanded to the District Court for further proceedings against the warrantor, and that the defendant Bourdier pay the costs of both courts.

VERRET ET AL. vs. AUBERT.

APPEAL FROM THE COURT OF PROBATES OF THE PARISH OF ASSUMPTION.

The settlement of an estate, administered by a curator before the Court of Probates, in which settlement the heirs were not properly represented, cannot be considered as *res judicata* against them. If made *ex parte* by the curator, it creates only *prima facie* evidence of the faithfulness of his administration, and correctness of the account rendered.

Tutors, except those by nature, are bound by law to obtain confirmation of EASTERN DIS.
April, 1834. their appointment by the judge of probates; to take an oath faithfully to discharge their duties, and to give security. Until a tutor complies with these duties, he can do nothing binding and conclusive on the rights of minors whom he represents.

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The plaintiffs aver that they are the legal heirs of Antoine Patire and Mageux André, deceased. That the defendant administered upon the estate of Mageux André, and took into his possession all the property belonging to her succession, amounting to the sum of forty-five thousand and ninety-six dollars and thirty-seven and a half cents. That about two thousand two hundred and fifty-four dollars and eighty-one cents, with legal interest, is due to the plaintiffs, by the defendant, and they conclude by praying that the defendant may be legally cited, and condemned to pay to them aid sum, or such portion as may be found due them.

The defendant in his answer, denies that the plaintiffs are heirs of Antoine Patire and Mageux André; states that he has rendered a general account of his administration, and that the account has been approved by the Court of Probates, and duly homologated. He added that should the plaintiffs prove themselves heirs, as stated in their petition, he then pleads that he has paid the amount coming to them, and has been duly discharged therefrom.

Godefroi Verret was appointed by the will of Louis Verret, testamentary tutor to the plaintiffs. Jean Labarthe, empowered by the said tutor, to regulate and settle with the defendant, for the amount which might be found due to the plaintiffs, as heirs, in common with others, to the estate of Mageux André, deceased, to receive and receipt for the same.

It appears from the minutes of the public inventory and sale of the property, belonging to the succession of Mageux André, that Jean Labarthe was present and assisted, and signed the same, as one of the heirs, and also representing the plaintiffs.

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It also appears that the defendant has rendered a general account of his administration, and which account was approved by the Court of Probates.

It is also in proof, that Jean Labarthe, as said attorney in fact finally settled with the defendant, and received from him the full amount due and coming to said plaintiffs, at the same time discharging the defendant from all further claim, on their part as heirs aforesaid.

The defendant had judgment, from which the plaintiffs appealed.

The judge *a quo*, certified that the foregoing is a faithful transcript of all the proceedings, as well as of documents filed in the said suit, and contains all the evidence adduced by the parties. The clerk made no certificate.

Porter and Wheeler, for plaintiffs and appellants.

Conrad, contra, urged,

1. That the citation is informal. The record is not properly certified. *Code of Practice*, art. 585.

2. That the Court of Probates had not jurisdiction of that suit.

3. That these plaintiffs are barred by the decree of the Court of Probates approving and confirming the account of the curator, and that decree cannot be collatorally questioned in this suit. *Martin's Rep.* 12, 534. *Kilgour vs. Ratcliff's heirs*, 2 N. S. 300. Plaintiffs' only recourse is an appeal, or an action of nullity. *Code of Practice*, arts. 556, 604, 605, 606.

4. That the court will presume that the oath required by law, was administered to the tutor; there being no law requiring the oath to be recorded, and consequently the judge is not bound to record it.

5. That supposing it was not administered, the omission of this formality, will not annul the acts done by the tutor

or curator. These provisions are only directory to the judge or the tutor, rendering them liable for their omission but not at all affecting the acts of their administration with third persons, acting *bona fide*. *Civil Code. Heineccius Recitationes, vol. 1, lib. 1, tit. 24, sec. 284, 285.*

6. At all events the payment made by the defendant, was made *bona fide*, to a person concerning whose authority to act he could not doubt, without attributing the grossest negligence to two successive judges of the state; he used all due diligence, has been guilty of no negligence or carelessness. A tutor is only bound to use such as a prudent father of a family uses in the management of his own affairs. *Dig. lib. 26, tit. 7, l. 33.*

MATHEWS, J., delivered the opinion of the court.

This suit is brought by some of the children and heirs of Louis Verret and Mary Patin, his wife, (both deceased) to recover from the defendant their portion of the succession of their maternal grand-mother, which was administered by him, and finally liquidated, as curator of that succession.

The defence set up against the claim of the plaintiffs, rests on three grounds:

I. Want of capacity in them as heirs.

II. Final settlement of the succession by the curator, and approval on their part, and

III. Payment to them of their portion, &c.

The court below rendered judgment in favor of the defendant, from which the plaintiffs appealed.

The grounds of defence, as above stated, were all which were pleaded in the Court of Probates, and they alone require the attention of this court.

As to the capacity of the plaintiffs, as heirs to the succession (or a part of it) of their grand-mother, this is fully made out by the evidence of the case.

The settlement and liquidation of the estate, administered by the defendant, as curator, &c., took place before the

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The settlement of an estate, administered by a curator before the Court of Probates in which settlement the heirs were not properly represented, cannot be considered as *res judicata* against them. If made *ex parte* by the curator, it creates only *prima facie* evidence of the faithfulness of his administration, and correctness of the account rendered.

Court of Probates, from which he had received his appointment, but in that settlement it does not appear that the plaintiffs were properly represented, and consequently it cannot be considered as *res judicata* against them. It was made *ex parte* by the curator, and the only effect which it can legally produce, is to create a sort of *prima facie* evidence of the faithfulness of his administration, and correctness of the accounts by him rendered.

The plea of payment, which alleges that it was made to the tutor of the plaintiffs, produces the only difficulty in the cause. It appears that Godefroi Verret, their brother, had been appointed tutor to them and others, the children of Louis Verret, (who died in the parish of St. Mary) by his testament. The testamentary tutor thus appointed, assumed to act in his capacity as such, without taking the oath and giving security as required by law, at the time of the death of his ancestor. See *Old Civil Code*, p. 68, arts. 53, 55, and p. 60, art. 14. And acting as the representative of the plaintiffs, in his capacity aforesaid, he empowered Jean Labarthe, then under tutor, to receive for them their portion of their grand-mothers succession, as administered by the defendant, which was by him paid over to the attorney in fact of Godfroi Verret, the tutor.

The principal, perhaps the sole question, presented by the cause, for solution, is to ascertain whether the payment was made to a person legally authorised to receive it and give a valid acquittance on the part of the plaintiffs, and such as bars their present claim. Notwithstanding the faithful and honest manner in which the curator seems to have discharged his duties, and the consequent reluctance which must be felt in condemning him to pay the money a second time, which he had already paid to the apparent tutor of the present claimants; we feel ourselves legally bound to answer this question in the negative.

Tutors, except those by nature, are bound by law to obtain confirmation of their appointment by

Tutors are bound by law to obtain the confirmation of their appointments by the judges of probates; to take an oath, faithfully to discharge the duties, and to give security. The

only exception, with regard to any of these requisitions, has relation to tutors by nature, and no others.

Until a tutor complies with them, however he may render himself responsible in damages on account of an interference, or intermeddling in a succession, he can do nothing binding and conclusive on the rights of minors whom he represents. Now as it is not shown that Godfroi Verret was either confirmed in his office of tutor, took the oath prescribed by law, or gave security; the payment was made to him through error on the part of the defendant, and he is still liable to pay to the plaintiffs the amount of their portion of their grand-mother's estate.

The part of this estate coming to the children and heirs of Louis Verret and his wife, after final settlement and liquidation, amounted to five thousand seven hundred and seventy-five dollars and seventy-two and a half cents. These heirs were twelve in number, only three of them are plaintiffs in the present suit, they are consequently entitled to three-twelfths of five thousand seven hundred and seventy-five dollars and seventy-two and a half cents, which amounts to one thousand four hundred and forty-three dollars and ninety-three cents. This sum they must recover from the defendant, with interest thereon, at the rate of five per cent. per annum, from the time when the funds belonging to their grand-mothers succession came into his hands.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates, be avoided, reversed and annulled; and it is further ordered and adjudged, that the plaintiffs and appellants do recover from the defendant and appellee, curator, &c., the sum of fourteen hundred and forty-three dollars and ninety-three cents, with interest at the rate of five per cent. per annum, from the 16th day of December, 1820, until paid, with costs in both courts.

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the judge of probates; to take an oath, faithfully to discharge their duties, and to give security. Until a tutor complies with these duties, he can do nothing binding and conclusive on the rights of minors whom he represents.

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The appellants moved for a rehearing. The motion was sustained. On the rehearing MATHEWS, J., delivered the opinion of the court.

This case is now before the court on a rehearing, granted at the solicitation of the appellants, for the purpose of correcting some errors of calculation in our former judgment, to their prejudice. The cause has been argued by briefs, and nearly the same grounds of defence are relied on, as were adduced on the former trial; the most important of which is the final settlement, and homologation of the accounts of the defendant, rendered to the Court of Probates, in his capacity of curator to the succession of which the plaintiffs claim to be heirs. These accounts were not settled contradictorily with the plaintiffs, or any person properly representing them, and the judgment of homologation is, therefore, as to them, without force.

The account rendered, states the heirs of Mary Patin, who were twelve in number, are entitled to three-twelfths or one-fourth of that amount, with interest at the rate of five per cent. per annum, from the time when the funds came into the possession of the defendant. The evidence of the case does not clearly show when that was. The 28th of June, 1820, is the earliest certain period shown at which he was in possession of the funds of the estate administered by him, &c. The one-fourth of six thousand nine hundred and thirty dollars and eighty-six and a fourth cents, is one thousand seven hundred and thirty-two dollars and seventy-one and a half cents.

It is, therefore, ordered, adjudged and decreed, that the judgment heretofore rendered by this court, be so amended, as to adjudge to the plaintiffs and appellants, the sum of one thousand seven hundred and thirty-two dollars and seventy-one and a half cents, with interest at the rate of five per cent. per annum, from the 28th day of June, 1820, until paid, with costs in both courts.

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EX'R.

APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

In an action for the balance due on an account, the prescription of three years, for the hire of movables or immovables, is applicable.

In such an action, where part of a claim was barred by prescription, and there was evidence of a partial payment made upon the claim; *held* the amount paid must be imputed upon that part of the claim which is prescribed.

The plaintiff claimed of the defendant, as testamentary executor of William McDonough, the sum of two thousand seven hundred and nineteen dollars and seventy-five cents, for the hire of two negro men slaves, from February, 1828, to November, 1832, at twenty dollars per month for each, and for several other items, specified in the account annexed to her petition. She alleged, that at the request of the deceased, she had suffered the sum due her to accumulate in his hands, on the faith of his repeated promises to invest the amount when it should be sufficient, in a house and lot for her.

The defendant pleaded the general denial and prescription.

Tourné, for plaintiff, testified that the said slaves had been employed by the deceased from 1826 until the time of his death. Their services were worth from twenty to twenty-five dollars per month, for each.

Ludeling, testified that the slaves had worked for the deceased from 1827, until his death. Deceased frequently advised plaintiff not to draw from his hands the wages of the negroes monthly, and he promised to invest the amount for her when it should be sufficiently large.

Hempkin, testified, that McDonough, in the summer preceding his death, admitted to witness that he owed plaintiff

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three or four thousand dollars, including the items claimed in this suit.

Reed, for the defendant, testified that the deceased had generally paid the plaintiff's son every week, for the hire of the slaves, since June, 1832. This testimony was corroborated by that of *Forsyth*.

McLaughlin, testified, that in 1829, the hire of the negroes was usually paid weekly, to a mulatress, in the name of the plaintiff, her mistress. It was afterwards paid to a lad, said to be plaintiff's son. He thinks a week never elapsed without the payment of the hire being made. Witness lived with the deceased from December, 1829, to May, 1830.

Short, testified, that during five or six months of the year 1831, the deceased paid the hire of the negroes to a lad called the plaintiff's son.

The defendant's witnesses concurred in proving the habit of the deceased, to take no receipts for these payments.

Judgment was rendered for the plaintiff, and the defendant appealed.

Carleton and *Lockett*, for defendant and appellant.

Schmidt, *contra*, urged,

The weight of evidence is in favor of the plaintiff, and as the question is one simply of fact, the judge *a quo*, was the proper person to appreciate it. The judgment ought, consequently, to be affirmed.

MATHEWS, J., delivered the opinion of the court.

This is a suit on an account, in which the plaintiff claims from the succession of the testator, a certain sum for the hire of slaves, and for articles sold to him during his life time. The answer contains a plea of prescription and the general issue. Judgment was rendered in the court below in favor of the plaintiff, for the sum of two thousand two hundred and seventy dollars, from which the defendant appealed.

The decision of the case depends principally on matters of fact, as disclosed by the testimony, and so far as the judgment of the Court of Probates is based on the facts of the case, we see no reason to form an opinion different from that expressed by the court below.

The greatest part of the sum claimed, is for the hire of slaves, and against this charge, the prescription pleaded, is to be found in the article 3503 of the *Louisiana Code*, which limits claims for the hire of movables or immovables, to three years. In the present instance, there is claimed for the services of two slaves, at the rate of twenty dollars per month each, from the 1st of February, 1828, to the 1st of November, 1832, being a period of four years and nine months. The citation in the suit, was served on the 14th of March, 1833, five years one month and fourteen days from the commencement of the hire claimed. The year's hire, which accrued from the 1st February, 1828, to the 1st February, 1829, would be barred by the three years prescription, after the 1st of February 1832. That accruing from 1st February, 1829, to 1st of February, 1830, was prescriptible after the 1st of February, 1833. But the present action was not commenced until the 14th of March of that year, therefore, two year's hire fall within the prescription relied on by the defendant, which reduces the plaintiff's claim nine hundred and sixty dollars, to be taken from the judgment rendered for two thousand two hundred and seventy dollars, leaving a balance of one thousand three hundred and ten dollars. An allowance of payment, to the amount of two hundred and ten dollars was admitted by the court below, as having been made by the testator on account, for the hire of these slaves, which ought to be imputed to the hire which first became due, and as the plaintiff loses by prescription the whole of the hire for the two first years, it would be unjust to impose on her this further loss of the two hundred and ten dollars. She ought to have judgment for one thousand five hundred and twenty dollars.

It is, therefore, ordered, adjudged and decreed, that the

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In an action for the balance due on an account, the prescription of three years, for the hire of movables or immovables, is applicable.

In such an action, where part of a claim was barred by prescription, and there was evidence of a partial payment made upon the claim: held the amount paid must be imputed upon the part of the claim which is prescribed.

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judgment of the Court of Probates be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the plaintiff and appellee do recover from the defendant and appellant, in his capacity of executor, &c., the sum of fifteen hundred and twenty dollars, with costs in the lower court, those of the appeal to be borne by the appellee.

ANDREWS vs. WITHERS'S HEIRS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The *Code of Practice* fixes the period when interest commences by the death of the debtor, but indicates no period when it ceases; the interest must, therefore, be considered as a legal accessory, accompanying and supported by the principal until payment.

W. C. Withers, being the creditor of plaintiff, made the following assumpsit:

"Assumed the payment of sixteen hundred and sixty-eight dollars and ten and a half cents, which will be paid as soon as the account is examined, which Mr. J. Andrews endorsed to T. Cavilier, and the mortgage raised, which is in favor of J. Andrews, against me, for four thousand dollars

"Signed,"

"W. C. Withers."

This paper is without date, but the account, which is proved by Cavilier to be the one referred to by this memorandum, which is rendered and signed by Andrews, is dated 2d February, 1829. Withers died 14th September, 1829.

To a demand for this debt or sum, which had never been paid, the defendants, heirs of Withers, pleaded the general issue.

Miramon, proves that in June, 1829, he was charged by plaintiff to deliver to Withers a certificate or act, raising a mortgage in plaintiff's favor, to the late Mr. Withers.

Withers then promised to pay the obligation given by him in favor of Cavilier. The acting executor of Withers, promised to pay this debt, but confounding it with a promissory note, given by Withers to Andrews, which he did pay, omitted it in his schedule.

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Judgment was rendered in the inferior court, for the plaintiff, with legal interest from the 14th of September, 1829, until payment. The defendants appealed.

Conrad, for defendants and appellants.

Janin, *contra*.

The judgment of the District Court ought to be affirmed with costs, the debt being duly proved, and interest being due thereon from the time of William C. Withers' death. See *Code of Practice*, art. 989. Payment had been demanded of, and promised, by the testamentary executors, and it is only owing to an oversight of the executors, that it was not made before they rendered their account.

MATHEWS, J., delivered the opinion of the court.

This action is founded on a contract, entered into between the plaintiff and the ancestor of the defendants. He obtained judgment for the principal sum claimed, and also for interest, &c., from which the defendants appealed.

The principal debt is not contested before this court, but the counsel for the appellants, complains of the allowance of interest, which was adjudged to have commenced from the death of the obligor. The interest was allowed in pursuance of the 989th article of the *Code of Practice*, which is expressed in the following terms; "As the creditors of estates administered by curators or testamentary executors, &c., can only obtain payment after certain delays, interest shall be allowed on their debts, if the estate be sufficient, from the death of the debtor, if they were due at the time, or from the date

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The Code of Practice fixes the period when interest should commence to run by the death of the debtor, but indicates no period when it ought to cease: consequently, it must be considered as a legal accessory, accompanying and supported by the principal until payment.

when they became due, if it were after that event, although no judicial demand may have been made."

The succession of Withers was administered by a testamentary executor, from whom payment of the debt claimed in the present suit, was demanded, but it was not paid. After the executor had settled his accounts, and been discharged from further administration of the succession, payment was amicably demanded from some of the heirs, and the demand not having been complied with, the present suit was commenced.

The Code of Practice fixes the period when interest should commence to run, by the death of the debtor, but indicates no period when it ought to cease; consequently, it must be considered as a legal accessory, accompanied and supported by the principal until payment. Contrary to this plain proposition, it is argued in favor of the appellants, that delay, which impedes the recovery of debts from a succession administered by a curator or testamentary executor, is limited to three months, and in proof of this we are referred to the article 1167 of the Louisiana Code. This article prohibits a curator of a vacant succession from the payment of its debts, (except some which may be privileged by law,) until three months after the succession may have been opened, and then only in the manner prescribed in subsequent articles.

The argument is, that as interest is granted in consequence of impediments imposed by law to the recovery of the debts, and that as such impediments cease after the expiration of three months, interest ought, also, to cease, and be recovered only after judicial demand. It is the *argumentum cessante ratione cessat ipsa lex*. It is certainly entitled to consideration, but in our opinion, ought not to prevail in the present instance. Three months is the time limited, within which a curator of a vacant estate is not permitted to pay its creditors, (and we shall consider the office of testamentary executor in the same light,) but much greater delays may occur by operation of law, in the classification of the debts, collecting those due to the succession, in acquiring the funds necessary to make payments, and various other ways, all which, we

presume, it was the intention of the legislature to cover by the article of the *Code of Practice*. It is general in its terms, giving only the commencement when interest shall begin to run, without limitation to its course; it must, therefore, as in all other cases, where debts carry legal interest, continue until payment.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

STATE OF LOUISIANA vs. THE JUDGE OF THE PARISH OF
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APPLICATION FOR A MANDAMUS.

During the lifetime of both father and mother, tutorship is unknown to the law. Minor children are then subjected exclusively to the authority of the father, who administers the property of his minor children as usufructuary, and is bound to protect them in their persons and rights. The courts of justice cannot deprive the father of any part of his authority at the suggestion of creditors, under the pretext of guarding the interests of the children.

The appointment of a tutor *ad hoc* presupposes that the minor is unprovided with a tutor.

Joseph Abat, as the endorsee of a promissory note, filed his petition in the Parish Court, praying a judgment for seven hundred and twenty dollars with interest, and for the sale of a certain tract of land mortgaged to secure the payment thereof. The note was signed by L. Even, by procuration of Mrs. Widow Larche. He stated that the drawer

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has since died, leaving for her testamentary heirs, the wife of L. Even, for one half of the estate, and the minor children of Even and his wife for the other moiety. The heirs were in possession of the mortgaged property. The note not having been paid at maturity, was protested. The action was brought against Mrs. Even and also against her husband, as the administrator of the property of the said children. The plaintiff prayed for the appointment of a curator *ad hoc* for the children.

The judge *a quo* refused to appoint a curator *ad hoc* as prayed for.

Dennis, for the plaintiff, applied to the Supreme Court for a *mandamus*, ordering the judge *a quo* to make the appointment as prayed for.

A rule *nisi* was granted, and the judge *a quo* showed cause on several grounds, which are stated in the opinion of the court.

BULLARD, J., delivered the opinion of the court.

This is a rule to show cause why a *mandamus* should not issue commanding the judge of the parish of Orleans to appoint a tutor *ad hoc* to the minor children of Louis Even and Angela Everhart, his wife, in order to protect the rights of said minors in a suit pending in the Parish Court, in which they are co-defendants with their father and mother.

The judge shows for cause of refusal to make an appointment:

I. That the said Angela Everhart and Louis Even are both living and present in this city and parish.

II. That no tutor can be appointed to children whose father and mother are both living, and in the same place with them.

III. That the father, during marriage, is the administrator of the estate of his minor children.

IV. That if no regular tutor can be appointed, a tutor *ad hoc* cannot be.

This court is perfectly satisfied with the cause shown. During the lifetime of both father and mother, tutorship is unknown to the law; minor children, during that period, are subject exclusively to the paternal authority. The father administers the property of his minor children as usufructuary, and is bound to protect them in their persons and rights. The courts of justice have no power to deprive the father of any part of his authority at the suggestion of creditors, under the pretext of guarding the interests of children. The appointment of a tutor *ad hoc*, i. e. for a special purpose, presupposes that the minor is unprovided with a tutor. But it is urged, that in cases where the interests of father and child are opposed to each other, and where the father may be tempted to sacrifice those of his child, the courts ought to appoint a special tutor for his protection. The court cannot perceive the force of this reason. If the power of the tutors *ad hoc* be confined to the mere defence of a suit brought against the child, then the only effect of such appointment would be to prevent collusion between the creditors and the father, which is not easily presumed. If his authority should continue after judgment, rendered against the child, how could he provide for the payment of it without recurring to the father, who is the only legal administrator of the property of his child? And if the property should be sold to satisfy the judgment, and a balance remain in the hands of the tutor *ad hoc*, he would be accountable for it to the father. To confer such authority on a tutor *ad hoc*, would be indirectly to deprive the father of his legal right to administer the property of his minor children, and to interfere with the paternal power, in a manner not recognised by law.

It is, therefore, ordered, adjudged and decreed, that the rule be discharged.

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During the lifetime of both father and mother, tutorship is unknown to the law. Minor children are then subjected exclusively to the authority of the father, who administers the property of his minor children as usufructuary, and is bound to protect them in their persons and rights. The courts of justice cannot deprive the father of any part of his authority at the suggestion of creditors, under the pretext of guarding the interests of the children.

The appointment of a tutor *ad hoc*, presupposes that the minor is unprovided with a tutor.

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PSYCHE vs. PARADOL ET AL., DUREL APPELLANT.

APPEAL FROM THE PARISH COURT, OF THE PARISH AND CITY OF NEW-ORLEANS.

The sale, by the executor, of property bequeathed as a specific legacy, is wholly irregular and void.

Neither the old *Civil Code*, nor the 11th law of the 2d title of the 3d Partida, authorised the appointment of a curator *ad hoc*, to represent a minor under the age of puberty.

The validity of a judgment, not reversed or appealed from, cannot be collaterally examined by either of the parties.

After the argument has commenced, new evidence cannot be introduced, except by consent of parties; but cases may occur in which the court might allow it under particular circumstances, and in the exercise of a sound discretion.

This action is brought to recover from the original defendant, a negro woman with her two children, and the hire of the said slaves.

To the petition, the original defendant filed on the 18th of July, 1832, an exception, viz. that it did not contain the residence of the plaintiff, and prayed that on this ground the petition might be dismissed.

On the 23d of the same month, the plaintiff's attorney appeared in open court, confessed that the exception was well founded, and obtained leave to amend his petition by inserting the residence, and directing the motion and order to be served on the defendant. This rule is on the minutes. The motion and order do not appear to have been served, but on the 10th of October, 1832, the original defendant answered to the merits, without any objection or reserve as to this course of proceeding. By the same answer, the original defendant called in warranty the present appellant, Jean Baptiste Durel, her vendor, who on the 23d of Novem-

ber, filed his exception to the want of mention of the plaintiff's residence in the original petition, and prayed that the same be dismissed, so far as he, the warrantor, is concerned.

On the 9th of February, 1833, the cause was called for trial on the exception of Durel, and the exception was overruled.

The facts, as disclosed by the record in this case, are as follows:

On the 30th of September, 1812, Marie Elizabeth Heloise Delahage, a free woman of color, made a nuncupative testament by authentic act, by which she bequeathed some slaves to the plaintiff, a minor, about four years old, of father and mother unknown; other slaves to her niece, Isis Bujac, residing in Philadelphia; gave a legacy of one hundred dollars, to one Lolo Brémont, and ordered that the surplus of the sale of her other property, be equally divided between the said plaintiff and the said Isis Bujac. By this testament, she also appointed J. B. Thierry, her executor, and requested him to become the tutor of the plaintiff. She died in 1813.

Among the slaves thus bequeathed to the plaintiff, was one by the name of Françoise. Françoise was, nevertheless, sold by the said Thierry, the testamentary executor, under an order of the Court of Probates, to Joseph Guillaume Lespinasse, who sold her to Durel, by whom she was sold to the defendant.

The testament was admitted to probate.

Thierry applied for, and obtained letters testamentary. They were signed by the Register of Wills, only.

No seals were affixed.

No public, but two private inventories were made.

Thierry, filed a petition for the homologation of the inventory, and for the sale of the property, partly in cash, and partly on a credit.

On this an order was given, June 26, 1819, in these words: "Let the inventory be approved and homologated, and the sale made according to law."

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The sale was made by the Register of Wills, according to the petition of the executor. Françoise was sold to Joseph Guillaume Lespinasse, for five hundred and seventy dollars.

In his process verbal, the deputy register does not state that the necessary advertisements had preceded the sale.

Thierry received the amount of the sales, being in all one thousand one hundred and fifteen dollars.

Thierry died in 1815, leaving a testament in which he instituted his minor daughter, residing in France with her grandfather, his universal legatee, and appointed Cyprien Gros and Guibert, his testamentary executors.

Moreau Lislet, filed a petition in which he states, that he had been appointed in France, pro-tutor of the minor heir of Thierry; that in this capacity, he wishes to render an account of Thierry's administration of Marie Elizabeth Heloise Delahage's estate; that said Thierry had obtained an authorisation to sell the property of said estate to satisfy the debts of said estate, the most of which were contracted during the last illness of the said Delahage, &c. He adds, that whereas the said Psyche, is under twelve years of age, and no person, not even Pierre St. Amand, was willing to accept her guardianship, he prays that a curator *ad hoc*, be appointed to her, and that said curator be cited to show cause why the account filed by the said Moreau Lislet, on behalf of the said late Thierry, should not be homologated.

To this petition is annexed an account, stating Thierry's expenses for Delahage's estate to have been one thousand and eighteen dollars, crediting the present plaintiff with five hundred and seventy dollars, as the price of the slave Françoise, and leaving in her favor a balance of five hundred and thirty-five dollars.

Upon this petition an order was granted, appointing Henry Henry, Esq., curator *ad hoc*, and citing him to show cause, &c.

Finally Moreau Lislet's account was homologated, and he was ordered to pay to the said Psyche, five hundred and thirty-five dollars, with five per cent. interest, from the 5th of March, 1815, the time of Thierry's death.

The plaintiff had judgment against the defendant. In favor of the latter a similar judgment was rendered against the warrantor, who appealed. In EASTERN DIS. April, 1834.

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J. Seghers, for warrantor and appellant, argued as follows:

The exception is a peremptory one, and the vendee of Durel could not give it up to his prejudice; Durel is, therefore, entitled to have the original petition dismissed, as to him, on this exception, without regard to the pretended amendments.

This exception being once raised, cannot be disposed of except by a trial and judgment, sustaining or dismissing the exception. An amendment cannot be allowed disposing of the exception in a collateral way, and defeating its object, which is the dismissal of the suit. *Code of Practice, articles 172, 343, 344. Projet of the Code of Practice, p. 62.*

The practice in France, at the time *Pothier* wrote, was, with regard to the manner of bringing suits, nearly the same as before our City Court, where no petition is required, but the defendant is served with a citation explaining the nature of the action. In France it was held necessary that the citation should contain all. *Article 172 of Code of Practice. Pothier, 1st part, chap. 1st, page 3. Pothier, article 4, "sur la forme des adjournemens."*

The same peremptory exceptions, which were urged in France against an *exploite de demande*, may be used here to defeat a claim brought under the form of a petition.

The cases where a petition cannot be dismissed, though the defendant may refuse to answer, are pointed out in article 320, which thus draws a strong line of distinction between such exceptions, and those that are of a peremptory nature.

Should the court be of opinion that the inferior tribunal was right in overruling it, then the merits of the case must be inquired into, and the first consideration to which we must attend is, that the point in controversy being a mere question of law, the verdict of the jury is not entitled

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to the same degree of confidence, as upon a question of fact. The charge of the judge was the true cause of the verdict. Under such circumstances, we maintain that the verdict cannot be entitled to any credit. A jury are undoubted judges of questions of fact, and of the question of damages, and it is the duty of a court to respect their decision on these points; but in the present instance, the question submitted to the jury was a mere point of law. 2 N. S. 643. *Dressen vs. Cox.*

On the merits, the case turns on the following points:

That the plaintiff cannot maintain her present action of *revendication*, because on the 31st of July, 1818, a final judgment was rendered by the Probate Court of New-Orleans, contradictorily with her, she being duly represented by a curator *ad hoc*; that by this judgment, the account of the estate of Marie Elizabeth Heloise Delahage, deceased, rendered by the heir of the testamentary executor of the latter, was approved and homologated; that it is therein stated that the slave Françoise had been sold by order of court, through the Register of Wills; that the price of the slave Françoise, now claimed in kind with her issue by the plaintiff, is fully laid down in said account; that no appeal has ever been taken from this judgment, which has acquired the force of *res judicata*; and that even supposing, for arguments sake, the plaintiff ever to have had any right of *ownership* in the slave Françoise and her issue, she has entirely lost the same by virtue of said judgment.

The question then is, whether with a former judgment standing unreversed, and forming *res judicata*, the plaintiff can recover in the present action? For if the verdict of the jury was allowed to remain undisturbed, the proceedings in relation to the rights of the minor, would present very singular features. There would be a judgment of a court of competent jurisdiction, deciding that the plaintiff was entitled to the price of the slave; there would be another, which, leaving the first judgment unreversed, would declare that she was the owner of the slave.

The first decree is as a plea, a bar or evidence conclusive between the parties. The errors which it may contain, were questions for the decision of the court which tried the cause, and the Supreme Court have no power to examine how they were decided, unless regularly brought before them by appeal, or by an action of nullity in those cases where the law affords such remedy. 5 N. S. 165, *Martin vs. Martin*. 2 Louisiana Reports, 589, 590, *Andrews vs. Herman*.

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In 1818, a curator *ad hoc*, was appointed to the minor, agreeably to law 11, tit. 2, *Partida 3*. *Curia filipica*, fol. 54. No. 8, *Verbo litigantes*. *Project of the Code of Practice*, fol. 21.

Cuvilier, for plaintiff and appellee.

Janin, on the same side, relied on the following points and authorities:

Nothing could authorise the executor to violate the directions of the testatrix, and his conduct in this and in other respects, was highly illegal.

Thierry's letters testamentary, ought to have been signed by the Judge of Probates. *Act, July 3, 1805*.

According to art. 173, p. 246 of the old Code, he ought to have caused the seals to be affixed, and an inventory to be made by the parish judge, or by any notary duly authorised by the said judge, in the presence of the presumptive heir or heirs, expressly called, &c. This must be a public inventory. *Ibid*.

There were none but testamentary heirs in this case, the plaintiff was one of them, she was not called, nor was her representative in her place, nor had she a representative, nor was one appointed to her.

One inventory only was approved, two had been made, which was approved and which not?

The sale was ordered to be made according to law. Did the judge thereby, also, approve the terms proposed by the executor?

The sale was ordered to be made according to law, and as it was partly on credit, it could not be made without the

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concurrence of the heirs, or their representatives, who never were cited. See *Old Code*, p. 175, art. 29. This article applies to testamentary executors as well as to curators of vacant successions, or absent heirs. *Old Code*, p. 247, art. 174.

Is it not incumbent upon the appellant, to show that they had?

By the testament, Françoise became the property of the plaintiff, a minor's property, and could, therefore, only be sold in the cases and in the form, in which the alienation of such property is permitted. It is not, and cannot be pretended, that the debts of the succession rendered the alienation of this property necessary. See *Fletcher vs. Cavalier*, 4 *Louisiana Reports*, 270, and the cases there cited on the sale of minor's property. The case of *Bynur vs. Lemerin*, 1 *N. S.* 628, is more particularly applicable to this case. See also, *Donaldson vs. Dorsey's syndics*, 5 *N. S.* 654.

As Thierry had rendered no account of his administration, as executor of the plaintiff's testator, his own executor ought to have rendered this account.

The plaintiff has never received any part of the five hundred and thirty-five dollars, and still this is the judgment which is said to deprive the plaintiff of her right of action in this suit.

This pretension is entirely unsupported by law.

The law has prescribed many regulations for the protection of the minor. They have been utterly violated in this case, than which few will better show their necessity.

The minor was not duly represented. A truly responsible person, a tutor, ought to have been appointed to her. If a person wishes to proceed against a minor, he must procure the appointment of a tutor, if the minor has none. *Old Code*, p. 65, art. 28. It is stated in the petition referred to, that no person was willing to accept the plaintiff's guardianship. An unproved allegation in a petition, is no guide to the judge; and if even no person had been willing to accept it, some person could have been forced to it. If the judge had made an appointment, the person appointed would have been

obliged to act, unless he could claim the benefit of the grounds of excuse, enumerated on pages 65 and 67 of the *Old Code*. No other excuse is admissible, if, as in this case, the minor has no relations in the territory. *Old Code*, p. 67, art. 39. And even if he had a valid excuse, the nominee is obliged to act, until on hearing his grounds of excuse, the court discharges him. *Old Code*, p. 67, art. 46. "The law has made an acceptance of this office compulsory, unless the person nominated is one of those who are excused from serving." *Bernard vs. Vignaud*, 1 N. S. 56.

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If the minor be above the age of puberty, he cannot appear in a court of justice, without the assistance of a curator *ad litem*, and if he has none, the judge must appoint one. *Old Code*, p. 74, art. 86.

Every tutor and curator, *ad litem*, must take an oath before entering on the duties of his office. *Old Code*, p. 69, art. 53; p. 75, art. 85. Such was the Roman, the Spanish and the French law *Code*. *Lib. 5, tit. 37, l. 28, sec. 4. 1 Tap. 154. 4 Tap. 13. Merl. Rep. Curateur, sec. 1, No. 5.* By the *New Code*, article 295, the tutor appointed at the request of a third person, who wishes to proceed against a minor, is also bound to take an oath.

Under no circumstances (at least under the *Old Code*), can a minor be represented by a curator *ad hoc*. And whenever the appointment of a curator *ad litem*, is admissible, the minor (above the age of puberty) if, as in this case, he resides in the state, must be consulted. The duty of appointing him, falls on the judge only, if the minor neglects or refuses to do so. *Part 6, tit. 16, lcx. 13, No. 2.*

Several decisions of this court have been rendered upon analogous principles.

In *Heno vs. Heno*, 9 Mart. Rep. 646, a minor under the age of puberty, was represented by a curator *ad litem*. The court said, that she ought to appear by a tutor. In *Onvesto vs. Rills*, 8 N. S. 585, an act of an administrator, otherwise perfectly legal, was not held binding upon the party contracting with him, because the administrator had not taken an oath; and in *Hasty vs. Hasty*, 8 N. S. 525, an adjudication

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under the advise of a family meeting, was set aside, because the members had not been sworn.

In this case a curator *ad hoc* was appointed, and he did not take an oath.

This curator took no steps for her security, and never objected to the amount presented on behalf of Thierry, which on its face is exorbitant. One thousand and eighteen dollars, the whole of which, with the exception of a legacy of one hundred dollars, was laid out, according to Thierry, for expenses of last sickness and the settlement of so small an estate, free from all debts; and although Thierry cumulated the functions of executor, of the executor's counsel, and of counsel of all the parties concerned, although no fees of counsel nor fees of physicians were paid, as is expressly declared.

The curator never inquired into the correctness of this account. The opposite parties put interrogatories in writing, of which, as far as appears on record, the curator took no notice, and which were annexed and sworn to before a justice of the peace. Page 20 and 24.

Moreau Lislet, the said curator, then drew up a judgment by consent, which was signed by them and filed in the Court of Probates, and adopted by the court, in entire conformity with Moreau Lislet's prayer. It became the opinion of the court; it was literally copied as the judgment of the court, and only headed with the words, "The court, after hearing both parties, &c." By this judgment Moreau Lislet, the pro-tutor, was ordered to pay to the plaintiff five hundred and thirty-five dollars.

From the proceedings, it is evident that Henry, the curator *ad hoc*, did not consider himself incumbered by the weight of any responsibility.

But the incongruity of such an appointment, is apparent from its necessary consequences. Henry did not claim the five hundred and thirty-five dollars of Moreau Lislet, nor would a payment to Henry have been valid for the same reasons, for which money belonging to absent heirs cannot be paid over to the attorney of absent heirs. *Dewis vs.*

Courviella, 4 *Mart. Rep.* 344. To make a valid payment, Moreau Lislet would have been obliged to cause a tutor to be appointed to Psyche. Why was, therefore, a tutor not appointed in the first instance?

Moreover, it is contended by the plaintiff, that the judgment, is a judgment drawn up by consent, without pre-previous judicial investigation, and a curator *ad hoc*, has no more right to enter such a judgment, than an attorney for absent defendants, has a right to confess judgment. *Caldwell vs. Townsend*, 5 *N. S.* 309.

When Thierry's account, as executor, was filed, no notice was given in the newspapers, *Old Code*, 179, p. 138, which might have apprized the minor's friends of proceedings in which her interests were committed. See, also, the late case in the matter of *Magnon's* estate.

The executor's payments, as alleged in his account, were not binding upon the plaintiff, they having been made without a previous order of court. *Old Code*, p. 179, art. 137. *Lafon's Heirs vs. his Executors*, 3 *N. S.* 707. The subsequent order or judgment was rendered, when the plaintiff was no party to the proceedings, and had no notice of them. She had a right to contest them, and therefore, to prove that the charges contained in the account, were false and exaggerated, and the evidence which they offered to this effect, ought not to have been rejected.

Wherever legitimate or testamentary heirs have undivided interests in an estate, their rights are to be discussed in the most comprehensive of actions, an action of partition. This is the case, although a testamentary executor may have been appointed. *Old Code*, p. 185, art. 155. In this case the plaintiff and Isis Bujac, were residuary legatees, each for one undivided half of the testatrix's estate, and in the action of partition, which ought to have been instituted, a tutor or curator ought to have represented them. *Old Code*, page 191, art. 186.

The plaintiff contends that the judgment of the Parish Court, is erroneous in one particular. The plaintiff was entitled, at least, to the value of the services of the slave

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Françoise, from the time of the institution of this suit. This right is given to her both by the old and the new code. *Old Code*, p. 360, art. 84. *Louisiana Code*, 3416, and 1 N. S. 409. *Richardson vs. Debreys and Longer*, 4 N. S. 127.

BULLARD, J., delivered the opinion of the court.

The plaintiff sues to recover a negro woman and her increase, bequeathed to her by the will of M. E. de la Hogue, as a specific legacy. She was, at the death of the testatrix, a minor orphan, under the age of puberty. The slave was sold by the executor, and after sundry conveyances, came into the possession of the present defendant, who sets up title under that sale.

The sale by the executor of property bequeathed as a special legacy, is wholly irregular and void.

It is clear that that the proceeding of the executor in relation to the slave in question, were wholly irregular and void. But the defendant pleads that afterwards, about the year 1818, while the plaintiff was still a minor, and under the age of puberty, the legal representative of the executor, then deceased, had rendered an account of his administration in the Court of Probates contradictorily with the plaintiff, which was finally homologated by that court by judgment, which forms a bar to this action, and has the force of the thing adjudged. By reference to the proceedings in that case, it appears that H. Henry was appointed curator *ad hoc* to the minor, and that a balance in money was found due to the plaintiff, but it is not pretended that she ever received it, or any part of it. This proceeding was conducted on the part of the representative of the executor, by L. Moreau Lislet, who styles himself protector of the minor heirs of Thierry.

It is contended on the contrary, that the plaintiff was not a party to this proceeding; that she was not legally represented by Henry, that no curator *ad hoc* could be appointed to represent a minor under the age of puberty, by the laws then in force; but a tutor alone, regularly appointed, could validly represent her, and that it was the duty of any person

having a claim against her, to provoke the appointment of a tutor. EASTERN DIS.
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The Civil Code then in force, does not authorise the appointment of a curator *ad hoc* to represent a minor under the age of puberty. But it is argued by the defendant, that such a proceeding is authorised by the 11th law of the 2nd Title, Partida 3. We are of opinion that adults only are spoken of in that law; that is evidently the opinion of Gregorio Lopez, who in a note, discusses the question whether the judge, when called on to make such appointment, is bound to consult the minor as to the person to be appointed; and he adds, that the practice is to appoint the person suggested by the minor. "*Ut ipse adolescens nominet quem vult ad illam Litem.*"

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Neither the old Civil Code nor the 11th law of the 2d title of the 3d partida authorised the appointment of a curator *ad hoc*, to represent a minor under the age of puberty.

If the construction of this law were at all doubtful, it would be rendered perfectly clear by reference to the 1st law, 16th title, of the 6th Partida, which treats of the tutorship of minors under the age of puberty. "*Otrosi dezimos, que el guardador deue ser dado para guardar la persona del mozo é sus bienes, é non deue ser puesto por una cosa o un pleyto senalado tan solamente.*" This law expressly forbids the appointment of a special tutor for a particular suit, except in the single case involving a question of freedom, on the part of the minor child.

The legislature has seen fit to introduce into the Louisiana Code and the Code of Practice, a different provision on this subject. The wisdom of that innovation on the former laws of the country, may be well questioned, when we see as in this case, the manner in which the rights of minors may be sacrificed by the appointment of tutors merely *pro formâ*, without any ultimate responsibility.

It is true that the validity of judgments not reversed nor appealed from, cannot be inquired of collaterally by either of the parties. This principle has been recognised by this court in several cases. But in this case, we are of opinion that the plaintiff was not a party, in any legal sense of the word, and that the judgment forms no evidence against her.

The validity of a judgment not reversed or appealed from, cannot be collaterally examined by either of the parties.

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In the case of *Vignaud vs. Bernard*, the court held that a judgment rendered against a person legally incapacitated to defend himself, or expressly privileged from judicial pursuit, ought to be considered as one rendered without parties, and absolutely void. In the case before the court here, there was neither party, citation, nor *contestatio litis*.
1 *Martin, N. S. I.*

After the argument has commenced, new evidence cannot be introduced, except by consent of parties; but cases may occur in which the court might allow it under particular circumstances, and in the exercise of a sound discretion.

The plaintiff has called our attention to a bill of exceptions, taken to the refusal of the court to allow a witness to be sworn after the argument had been opened on the part of the plaintiff, and the defendant had commenced his reply. The article 484 of the Code of Practice, forbids any new proof to be introduced without the consent of all parties, after the argument has commenced. There may be cases in which the court might allow it, if under particular circumstances, and, in the exercise of sound discretion; but in this instance, we are not enabled to say that the judge erred.

The defendant's warrantor complains that the original defendant waived what he calls a peremptory exception, by which means he has been deprived of the advantage of having the suit dismissed and pleading prescription, if a new suit should be brought. But, by the Code of Practice, the warrantor himself has a right to plead all the exceptions which the original defendant might have done, even those which are personal to him. *Article 384.* He did in fact plead the same exception, to wit: that the residence of the plaintiff was not stated in the petition. Therupon a supplemental petition was filed, setting forth his residence, and the warrantor filed an answer to the merits without taking a bill of exceptions. We cannot, therefore, inquire whether the court erred.

It is therefore ordered, adjudged, and decreed by the court, that the judgment of the Parish Court be affirmed with costs.

J. Seghers, for warrantor and appellant, applied for a rehearing on the following grounds: EASTERN DIS.
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A final judgment having been thus rendered on the peremptory exception, no bill of exceptions could have been taken thereto, for the inferior judge would not have allowed it; the constant practice of the lower tribunals, being never to permit a bill of exceptions to be taken, except when the matter cannot appear in any other shape before the Supreme Court. This is the very maxim laid down by philosophers, that a multiplicity of beings ought to be avoided. *Entia non sunt multiplicanda sine necessitate.*

Durel, the warrantor, having been ordered to answer to the merits, by the above judgment of the 26th March, 1833, did file his answer on the 6th of April, 1833, expressly reserving to himself the benefit of his peremptory exception.

In order that the trial of this case might be no longer postponed, Durel answered not only to the plaintiff's original petition, and to the defendant's call in warranty, but even to the new matters pleaded in the plaintiff's supplemental petition, which had never been served on him; but, as already stated, he did not do so, without expressly reserving to himself, for the appeal, the benefit of his peremptory exception, which had been overruled by the interlocutory judgment of the 26th of March, just mentioned.

He was ruled to answer to the merits, and did so without prejudice to his rights.

In the case of *Muse vs. Curtis*, 8 *Martin's Reports*, p. 721, a motion for a new trial was overruled by the court, and no bill of exceptions was taken; which was contended to be unnecessary, as this court was bound to notice it, on the appeal from the final judgment, without having their attention thereto directed by a bill of exceptions. "We are of opinion," says the Supreme Court, "that this is correct."

"At common law," says *Phillips on Evidence*, 214, "a writ of error could not be brought for any error in law, which did not appear on the record; and, therefore, when the plaintiff or defendant alleged any thing *ore tenus*, which was overruled

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by the judge, the party aggrieved had no redress." To remedy this defect, bills of exception were introduced by *stat. 13, Ed. 1, sec. 31*. Now, a judgment being a matter which appears on record, no bill of exceptions can, of course, be required.

BULLARD, J., delivered the opinion of the court.

The warrantor has prayed for a rehearing on the question, whether the exception taken to the petition that it did not set forth the place of residence of the plaintiff, was a peremptory exception which ought to have been sustained, and consequently the suit dismissed. Our attention is called to an expression in the opinion heretofore delivered, from which it might be inferred that we thought a bill of exceptions necessary, whenever the inferior courts overrule an exception in writing. Such was not the meaning of the court, and the expression was used inadvertently, probably under the impression that the proceeding took place during the trial.

We think the court did not err in allowing an amendment and a supplemental petition to be filed. The exception does not, in our opinion, go to extinguish the action; nor does this appear to us one of those nullities of form, for which a suit ought necessarily to be dismissed.

The rehearing is refused.

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An universal legacy, bequeathed to the concubine of the testator, cannot exceed in amount the one-tenth part of the movables and immovables of the estate of the testator.

The sale of property bequeathed, made by a universal legatee, is liable to be attacked, though the sale was in good faith, if a reduction of the legacy is afterwards decreed.

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The plaintiff alleges that she is the mother and forced heir of Edward Lowery, deceased.

That he died, leaving lots, slaves and personal property, worth six thousand five hundred dollars.

That defendant pretending to be universal legatee, under his will, has taken possession of all said property.

That the legacy is null. 1. Because she lived in open concubinage with the deceased. 2. Because Lowery could not dispose of his whole property, having a forced heir.

That J. J. Hall, is in possession of a slave named Joe, worth one thousand two hundred dollars.

She prays that Elizabeth Kline and J. J. Hall be cited, that she have judgment against the former for six thousand five hundred dollars, and the latter for one thousand two hundred dollars, with costs.

The defendant denied the allegations in plaintiff's petition generally.

She denied that the lots mentioned in the petition belonged to Edward Lowery.

She alleged that the only property owned by Lowery, was that mentioned in his will, that it was owned jointly between him and her, and that he had given her his half for the causes stated in his will.

She alleged that the donation, in reality, amounted to nothing, for that as executrix and legatee, she had sold the property for its full value, and that the debts she had paid for the estate, amounted to far more than the value or proceeds of the property.

She annexed a statement of debts paid for the succession, and of the proceeds of the property.

She and Hall both pleaded that plaintiff had no title to the slave Joe.

The claim of the plaintiff for the four lots is abandoned. They were never paid for, and were sold by the sheriff, at the suit of the vendor, for the price.

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The district judge declares that the defendant and deceased lived in concubinage; that the declaration in his will, that one-half of the property belonged to her, is a disguised donation, and that this, and the donation of the other half, must be reduced to one-tenth of the value of the personal property.

The will contains the following clauses:

"I acknowledge that the property in possession of myself and Elizabeth Wingard, has been made by our joint industry, and that one half of it justly belongs to her at present.

"Said property consists of two slaves, named Joe and Charity, two horses, a cart, dray and gig, a stock of hogs and household furniture, and a note due from George During, for two hundred and fifty dollars.

"I appoint Mrs. Elizabeth Wingard my executrix, authorising her, in case of my decease, to take possession of the whole of my property, without the intervention of justice, and pay all my just debts.

"I give to my nephew, Arnold Laveau, the sum of two hundred and fifty dollars.

"I give all the remainder of my property to Mrs. Elizabeth Wingard, instituting her my universal legatee, in consideration of the care and trouble she has taken, and the expense she has incurred for me during my long and distressing illness."

Samuel Wilson, witness for the plaintiff, testified that he knew the late Edward Lowery during his lifetime. Witness lived some time in the same house with him in the upper faubourg, previous to his removal to the parish of Jefferson; that said Edward Lowery kept house at this time, and lived as man and wife with the defendant, Elizabeth Kline; it was not understood that Lowery and said defendant were married, although they lived together. Witness knows that the deceased owned a negro man and a negro woman, two horses, a cart and a gig; he believes he had also some hogs at the time of his death; that Lowery had been in a bad state of health for a long time previous to his death; that during a considerable time previous to his death, he was in such a state as to require a great deal of nursing and care. Witness, on

visiting the house of Lowery, always saw the defendant Elizabeth Kline taking care of him; that said Lowery was in a very low state of health for eight or nine months previous to his death; his disease was said to be consumption; that Lowery was very poor when he first went to keep house with the defendant Elizabeth Kline. Witness knows that he borrowed money from her at this time.

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Mrs. Kline offered to prove by witnesses, that her services rendered Lowery, in nursing and taking care of him during his last illness, were worth seven hundred and eighty-five dollars; the testimony was objected to, and after argument the court refused to admit it; to which opinion of the court the defendant excepted.

The defendant offered witnesses to prove that the declarations contained in the last will of Lowery, that all the property which he and Elizabeth Wingard possessed when he died, had been acquired by their joint industry, and that one half justly belonged to her, was true; and that it had, as alleged in her answer, been principally accumulated by her industry and economy; and further to prove his declaration, that he gave all his interest in it to her, for services rendered him in his last illness, as a remunerative donation for full consideration, offering to prove by said witness that her services were worth more than the interest of said Lowery in said property; the evidence was objected to, and after argument, rejected by the court, to which opinion of the court the defendant excepted.

Roselius and McMillen, for the plaintiff and appellee contended that:

1. The judgment has error in it, as it does not allow the plaintiff the slave Charity, which is mentioned in every bill of sale, as well as the last will of Lowery; and because any thing is allowed to Kline, under the pleadings in the case, and under the will, which is shown to be null and void according to the allegations in plaintiff's petition.

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2. There is no proof of the death of the slave Charity.

3. The testimony of Wooley and others going to establish a claim on the part of Kline, in offset or compensation, was improperly admitted; no such claim having been set up by said defendant; and it went to establish title to real property by parol.

4. The testimony of Francis Cannellas, as to the occupation of the house by Kline, after the death of Lowery, was properly received, after Kline had introduced the receipts to show that she had paid the rent.

5. The testimony of Wileau and others, which were offered to show that the services of Mrs. Kline in nursing and taking care of Lowery were worth seven hundred and eighty-five dollars, were properly rejected, as no such claim was set up by the pleadings.

Preston, contra, contended as follows:

1. It cannot be denied that the defendant once lived in a state of concubinage with the deceased, but he died of a slow consumption, and eight months before he died or made his will, she was his nurse and not his concubine.

2. The judge, even under the article quoted by him, should have reduced the donation to a tenth of the *whole* estate of the deceased, not to a tenth of his personal property.

3. But the death-bed and most formal solemn declaration of the son that one half of the property mentioned in his will belonged to E. Wingard, was in their joint possession, and made by their common industry, was *true*, and not as his mother alleges, *false*. This results conclusively from the testimony of Samuel Wilson.

4. As to the half which Lowery claimed as his in his will, and donated it to the defendant, except two hundred and fifty dollars, in consideration of the care and trouble she took, and the expense she incurred for him during his long and distressing illness, the donation is valid; it was a remunera-

tive donation. It cannot be reduced below the value of the services. *Code of Practic, arts. 1500, 1512, 1513.*

5. The testimony of Wilson, Casenave and Connelly, on behalf of the plaintiff, shows that Edward Lowery was sick a year before his death with the consumption, that defendant constantly nursed and attended him. These were priceless services to a dying man. They were worth half of Joe, for the district judge admits that it required more than the personal property to pay the debts of Edward Lowery, and Charity is dead.

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6. If the testimony offered by the defendant, and rejected by the judge *a quo*, was properly rejected, no remunerative donation can be proved real. It is sufficient to allege that it is unreal, and the consideration expressed in the donation must fall, because no proof can be admitted against the allegation.

7. The district judge has equally erred in his calculation of the receipts and expenditures of the defendant, as executrix.

8. The judge gives judgment against Hall for the slave Joe, to whom he was sold by Mrs. Wingard, as legatee by a will valid as to third persons, duly proved, and attacked only on account of facts *en pais*, and which could not be known to third persons. To disturb the title to property made by a person having a legal title on the records of our courts of justice, there existing no defect of form, in a *bona fide* purchaser, would destroy all confidence in our courts of justice, and indeed in society itself. It has been the constant course of decision of courts, that a sale made under a will admitted to record as good, is valid, though the will or legacy should afterwards be set aside for defects depending upon proof unknown when admitted to record.

MARTIN, J., delivered the opinion of the court.

The petition states that the plaintiff's son, whose forced heir she is, left several lots, slaves and some personal estate, of which the defendant Kline is in possession, and to which

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she claims title as universal legatee, except as to a slave, which is in the possession of the defendant Hall. The legacy is alleged to be null, because her son lived in open concubinage with the legatee, and because she left a mother and forced heir.

By his will, which is annexed to the petition, the plaintiff's son acknowledges, on the 13th of August, 1830, that all the property in his and Kline's possession, was made by their joint exertions, and one half thereof belongs to her. He adds that it consists of two slaves, Joe and Charity, two horses, a cart, dray, gig, stock of hogs, some household furniture, and the note of one Durell for two hundred and fifty dollars. He gives a small legacy to a nephew, and bequeathes the rest of his estate to Kline, in consideration of the care and trouble she took for him, and the expences she incurred during his protracted illness.

The defendant Kline pleaded the general issue, denied that the lots mentioned in the petition were the property of the testator, and that he possessed any property except that which he owned jointly with her, as stated in the will. She averred that the legacy to her was a mere nominal donation, as she had paid, as his executrix, debts of his to a larger amount than had been realised by the sale of the property.

The defendant Hall denied that the deceased had any title to the slave Joe, and he pleaded the general issue.

There was judgment for the plaintiff against the defendants, and for the defendant Hall against the defendant Kline, whom he had called in warranty as the vendor of the slave Joe.

From the the two judgments against her, the defendant Kline, appealed.

The plaintiff has prayed that the judgment be amended, so as to allow her the slave Charity, and by increasing the amount recovered.

The counsel for the appellant has contended that the first judge erred in reducing the legacy to one tenth of the personal property only, and ought to have allowed one tenth of both the real and personal property; and in considering the

testator's declaration that Kline was the owner of one half of the property of which they were in joint possession, as a disguised donation, and an attempt to elude the provision of the law, incapacitating a concubine from receiving more than one tenth part of the testator's property.

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The counsel further complains that the first judgment erred in charging her on the warranty with the price she received for Joe, sold to Hall, and complains of overcharges against her, and the reduction of her own bill made.

It has appeared to us that the claim of the appellee to an amendment of the judgment, so as to allow her the price of the slave Charity, cannot be considered, as this slave was claimed from the defendant Hall; and this claim disallowed. As Hall is not a party to the appeal, the decision of the judge below as to that slave, is not properly before us.

We are of opinion that the District Court erred in reducing the universal legacy to one tenth of the *personal* estate; it was only reducible to one tenth of the value of the estate; in the French text, *de la valeur totale des biens*. *La. Code*, 1468.

An universal legacy bequeathed to the concubine of the testator, cannot exceed in amount the one tenth part of the movables and immovables of the estate of the testator.

The appellant's counsel has further argued, that as she was on the face of the will the universal legatee, Hall, her vendee, acquired a good title to the slave Joe under her sale; a title, which it is contended, cannot be attacked, he being in good faith, by a subsequent claim to the reduction of the legacy. To this the answer is, that the price of the slave is received from her by her co-defendant Hall, who called her in warranty, that as to him not being before us, prevents us from considering the judgment he has obtained against her, and has to the appellee, the merits of the case are against her, as she sold a slave which she would be compelled to restore, if it was in her possession.

The sale of property bequeathed made by a universal legatee, is liable to be attacked, though the sale was in good faith, if a reduction of the legacy be afterwards decreed.

The reciprocal complaints of both appellant and appellee as to overcharges and rejection of items, depend on the evidence offered below, and as it is not very clear that the inferior court was mistaken, it is not our duty to doubt the judgment.

The appellant is entitled to a reduction of the sum received

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ed from her by the appellee, of one tenth of the value of the two slaves, or one hundred and ten dollars.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, as far as it concerns the recovery of the appellee from the appellant, be annulled, avoided and reversed, and that the former receive from the latter the sum of one hundred and forty-seven dollars, with interest at 5 per cent. till paid, with costs in the District Court, and that the appellee pay costs in this court.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The sureties on a curator's bond, are not bound in warranty to purchasers of property belonging to the succession administered by him.

The responsibilities of sureties in bonds, given to secure the faithful discharge by curators of their duties, renders them liable for misconduct, only to the heirs and creditors of the deceased.

The plaintiff claimed of Maunsel White, as the surety of the late John A. Foote, in a curator's bond, the sum of three thousand one hundred and twenty-four dollars.

The plaintiff alleges that on the 15th October, 1811, Christopher Elliot, now deceased, purchased from the corporation of the city of New-Orleans, and under a ground rent, a lot situated in the city, at the corner of Bienville and Rampart streets.

The said Elliot had already commenced erecting thereon some buildings, which were still unfinished when he died, some time in the year 1811, leaving a widow and

several minor children, but who were all absent, and not represented in the then territory.

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John A. Foote was appointed curator to the said estate, on the 28th of September, 1811, and executed on the same day his bond, with James Martin and Maunsel White, as his securities *in solido*, for three thousand one hundred and twenty-four dollars, conditioned that the said administrator should well, and according to law, administer the said estate, and should render a true, just and perfect account of his actions and doings, whenever lawfully required to do so.

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Foote, having caused an inventory to be taken of the estate, provoked the sale at public auction, of the property belonging to said estate, and especially of the said lot and buildings, which were adjudicated to Samuel Elkins, of this city, as having been the highest bidder thereof.

The lot and buildings were afterwards sold by Elkins to George T. Ross, now deceased, for a valuable consideration, and at certain terms of credit, and that the purchaser having failed to comply with the terms and conditions of the said sale, Elkins caused the property to be seized and sold. It was adjudicated to Louis Brognier Déclouet.

Déclouet sold the property to petitioner, who, after having erected several outbuildings and made considerable improvements thereon, sold the same to Louis J. Labarre, now deceased.

A suit was instituted by William Elliot and others, the lawful children and heirs of the late Christopher Elliot, against the widow and heirs of the said Louis J. Labarre, his purchaser, in order to evict them from the aforesaid lot and buildings, as having been illegally sold by Foote, as curator to the estate of their deceased father.

The plaintiff also alleges that in consequence of the said claim, the widow and heirs of Labarre called the plaintiff in warranty, and the plaintiff cited in warranty Déclouet; that the heirs succeeded in obtaining a judgment, by which the sale made of their ancestor's property was declared null, and the plaintiff was at the same time condemned to pay to the widow and heirs a sum of five thousand seven hundred sixty-

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three dollars and seventy-five cents, for damages he had thereby suffered, which amount the plaintiff was decreed to be entitled to recover from Déclouet; that the plaintiff paid to the said widow and heirs of Labarre, including the interests and costs, the sum of six thousand three hundred twenty-nine cents, without being able to recover from his warrantor more than a sum of two thousand three hundred and twenty dollars, which leaves a balance still due to the plaintiff of a sum of four thousand nine dollars and thirty-nine cents. That Elkins and Ross transferred to each of their purchasers, and finally to the plaintiff all the rights and actions which Elkins had originally against the late John Foote as curator to the estate of the said Christopher Elliott; that Foote died insolvent, and had never rendered any account of his administration.

The defendant admits that he signed a bond in the year 1811, with one James Martin, as surety for John A. Foote, who had been appointed curator of the estate of C. R. Elliot; but he says that the said Foote was dismissed from his duties of curator aforesaid by the Court of Probates of the parish and city of New-Orleans, and that in the year 1812, this respondent and the said Martin were cited to show cause to said court why they should not pay the amount of the bond aforesaid, which cause is yet pending and undecided in the said court. That the said Elliot owed debts at his death yet unsettled, and that the plaintiff herein has no right to call upon the respondent to account to him individually; that he is now sued upon said bond by one B. C. Elliot, as administrator of the said C. R. Elliot's estate. He denies all and singular the allegations in the said petition contained, except as expressly admitted.

The bond referred to contained the following condition: "The condition of the above obligation is such, that if the above bounden John A. Foote, curator of the estate of the late C. R. Elliot, deceased, does well and truly according to law administer the same, and further, does make and render a true, just and perfect account of his actions and doings, when thereunto lawfully required, either by the aforesaid

judge or his successors in office, agreeably to law, or by the heirs of the said deceased, or their lawful attorney or attorneys, or by the duly appointed and authorised executor or executors of the last will and testament of the said deceased, should it hereafter appear that any such will or testament was by the said deceased made, then this obligation to be void, or else to remain in full force and virtue."

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The judge *a quo* considered that there was no difference between the situation of a curator and a vendor, who sells a defective title but in good faith with a clause of nonwarranty; in that case, the maxim of *caveat emptor* would clearly apply, the purchaser having the same means of discovering the defect as the vendor. Much reliance was placed upon that part of the condition of the bond given by the curator at the time of his appointment, which says that he shall *legally* administer. He considered that the bond was given as a judicial security, and if the judge has exacted conditions more than the law required, they are to be disregarded; the law has said that the condition of the bond should be "for the fidelity of his administration," and the judge had no right to require more, and he cannot add to this obligation.

The defendant had judgment, from which the plaintiff appealed.

Soulé, for the plaintiff and appellant.

McCaleb and *Gray*, *contra*, relied on the following points:

1. Longpré cannot sue upon the bond, as it is given only for the security of those who have claims upon the estate, or are interested in its proper administration, as heirs and creditors only; Longpré is neither heir or creditor.

2. White's responsibility is to the estate, its heirs and creditors, and is only to the amount of the inventory or sale; and the whole amount of the latter being already recovered by the heirs and administrator of Elliot, (*Elliot vs. Labarre*, 2 *La. Reports*, p. 326. 3 *Id.* p. 541. 5 *Id.* *R. C. Elliot vs. Maunsel White*.) he is discharged from any further liability.

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Vattel's Law of Nations, book 2, p. 617. sec. 287. *Civil Code*,

3008. *Pothier on Obligations*, vol. 1 of *Sureties*, p. 259, arts.

1928, 2121. *Starkie's Law of Evidence*, vol. 3, title *Penalty*.

7 *Wheaton*, R. 13. *Pothier on Obligations*, vol. 1, p. 207.

3. There is a suit now pending in the Probate Court, of the heirs of *Elliot vs. White* and his co-surety, to account as securities for the administration of Foote.

4. The bond has not been assigned to the plaintiff, and cannot be, now that its original object has been answered, the protection of the estate from the mal-administration of Foote, the curator.

5. But in no event, even admitting that White was responsible in the manner alleged, could Longpré recover more than the sum paid his vendor, Declouet, for that is the extent of the loss sustained by him in consequence of the recovery of the lot in question by the heirs of Elliot.

MATHEWS, J., delivered the opinion of the court.

This is a suit against the surety of one John Foote, who was appointed curator to the succession of Elliot, who died in October, 1811. Judgment being rendered in the court below for the defendant, the plaintiff appealed.

The facts of the case, important to its decision, are the following: Foote, who administered in the capacity of curator to the vacant estate, caused an inventory of it to be made, and had the property sold; amongst which, was a lot of ground, situated in the city, on Bienville street. The heirs of Elliot lately recovered from the person in possession the lot in question, as having been sold by the curator without the formalities required by law. The plaintiff in the present action was cited in warranty and judgment rendered against him for a certain amount, and also judgment in his favor against his immediate vendor, as his warrantor for the same amount, a part of which has been recovered as stated in the petition, &c.; this suit is brought to recover the balance. It appears that the property was purchased at the sale of Elliot's succession, by Samuel Elkins who sold to

George Ross, and he having failed to pay the price, it was seized and sold. At this sale Declouet became the purchaser, who afterwards sold it to the present plaintiff.

The right of action claimed in the present instance, is assumed under subrogation to the rights of warranty alleged to reach back to Foote as the original vendor. But whether this assumption be correct or not we deem it useless to enquire, for if it be admitted, it does not follow as a legal or necessary consequence that Foote's sureties in the curator's bond are bound in warranty to purchasers of property belonging to the succession administered by him. The responsibility of sureties in bonds given to secure the faithful discharge of their duties as curators, renders them liable for misconduct only to the heirs and creditors of the deceased. It is evident that the plaintiff is neither heir or creditor of Christopher Elliot, whose succession was administered by Foote. Whatever liabilities *he* may have subjected himself to in consequence of the informalities in the sale of that succession, his sureties cannot be held responsible to any other persons except those *immediately* interested in its faithful administration, viz: creditors and heirs.

The sureties on a curator's bond are not bound in warranty to purchasers of property belonging to the succession administered by him.

The responsibilities of sureties in bonds given to secure the faithful discharge by curators of their duties, render them liable for misconduct only to the heirs and creditors of the deceased.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

ROBINSON ET AL. vs. TAYLOR ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where bills of exception have been taken by both parties, and where all the evidence objected to might have been admitted without materially changing the facts; the Supreme Court will not examine the correctness of the decision of the judge *a quo* upon any of the bills of exception.

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ET AL.
VS.
TAYLOR
ET ALS.

Cotton in the possession of a certain person, shipped by him, and marked with the initials of his name, must be presumed to be his property.

This action was brought by the payee against the drawers of an accepted bill of exchange.

The plaintiffs aver that the firm of Taylor and Klein, established at St. Marks, in the territory of Florida, and composed of Taylor, Klein and Ellis H. Buell, drew their bill of exchange, dated New-Orleans, 4th January, 1831, wherein said firm requested E. H. Buell, six months after date, to pay to the order of the petitioners, four hundred and eighty-six dollars and twenty-seven cents.

That the bill was duly presented for acceptance, and accepted by Buell, the drawee; that when it fell due, diligent enquiry was made for Buell, in the city of New-Orleans, in order to demand payment, but he could not be found, being then absent in foreign parts; and that payment was then demanded of his agents in the city, who refused it, alleging they had received no order to that effect from their principal, and had no funds in their hands belonging to the parties to said bill, whereupon it was duly protested for non-payment, and due notice thereof given to Taylor and Klein, who had full knowledge of the dishonor.

The general issue was pleaded.

The bill of exchange referred to, was in the following words.

“New-Orleans, 4th January, 1831.

“Six months after date, pay to the order of Robinson and Chenery, at the Bank of Louisiana, in the city of New-Orleans, four hundred and eighty-six dollars and twenty-seven cents, for value received, and charge the same to

“Your obedient servants,

“signed,

“Taylor & Klein.

“To Capt. E. H. Buell, New-Orleans.”

No protest was proved, but in lieu thereof the plaintiffs read in evidence the following document, signed by Ellis H. Buell.

"As one of the members of the firm of Taylor & Klein, at St. Marks, Florida, I do hereby waive the want of a protest and notice of a certain bill of exchange, drawn by said firm of Taylor & Klein on and accepted by me, dated New-Orleans, 4th January, 1831, for four hundred and eighty-six dollars and twenty-seven cents, and payable six months from date, and do hereby on the part of said firm relinquish and abandon any defence arising from the absence of said protest and notice, and hold the said firm liable in the same manner as if all legal formalities had been complied with, in relation to said bill of exchange, the same having been omitted to save the credit of said firm."

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"New-Orleans, 23d of February, 1832."

An attachment was obtained, and Stilwell and Kimball were made garnishees, who in answer to interrogatories, confessed that they had in their possession a quantity of cotton belonging to the defendants.

Robert Lyon intervened, and alleged that the said cotton was his property, purchased by him of various persons residing in or about the town of Magnolia, and shipped through Taylor and Klein to New-Orleans, for his account. He prayed that the attachment be set aside, because,

First. There was no legal surety to the bond, inasmuch as a member of a commercial partnership is not authorized to use the title of the firm, as judicial surety.

Second. That H. H. Jones, the signing surety of the bond, was not a competent surety, inasmuch as he was a citizen of the city of New-York.

The exception was overruled.

The bill of lading of the cotton was in the following words:

"Shipped in good order and well conditioned, by Taylor and Klein, on board the good schooner called the Cora, whereof J. B. Carson is master, for this present voyage, now lying in the port of St. Marks, and bound for New-Orleans, to say, twenty-five round bags cotton."

"Being marked and numbered T & K, (as in the margin) and to be delivered in the like good order and well condi-

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tioned, at the aforesaid port of New-Orleans, (the dangers of the seas only excepted) unto Stilwell and Kimball," &c.

This bill of lading was received by the garnishees, accompanied by the following letter:

"St. Marks, 23d March, 1832.

"*Messrs. Stilwell and Kimball.*

"Annexed please find bill of lading and invoice of seventy-five bags cotton, shipped to your address, which you will please receive, and sell to the best advantage, and hold the proceeds, subject to our order.

"Respectfully your obt. servts.

Signed,

"Taylor and Klein."

Several witnesses testified that it was generally believed Buell and the defendants were co-partners.

The judge *a quo* rendered judgment for the plaintiffs and against the intervening party.

The latter appealed.

Keene, for intervenor and appellant.

1. The evidence of the case establishes the ownership of the cotton in question, to be in the appellant.

2. The proceedings of the appellees have been informal and illegal, and consequently of no effect. First. In respect of the want of protest and notice. Second. On account of the insufficiency of the security given in the attachment bond.

3. Even to waive, for argument sake, the preceeding points, yet the appellees would not be entitled to recover, for not having duly made out their claim upon Taylor and Klein.

Conrad, for plaintiffs and appellees.

MATHEWS, J., delivered the opinion of the court.

This suit was commenced by attachment, and Stilwell and Kimball were summoned as garnishees, who in answer

to interrogatories acknowledged that they had property in their possession belonging to the defendants, which on further investigation was shown to be twenty-five bales or bags of cotton, shipped by said defendants to the garnishees, from St. Marks, in East Florida, to New-Orleans. Lyon intervened in the suit, and claims the property attached as his own. Judgment was rendered against the defendants in the court below, and the claim of the intervenor dismissed, as not having been supported by evidence. From this judgment he alone appealed.

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From this statement it is readily seen that the decision of the case depends solely on matters of fact. It is true there are some bills of exception, but if the evidence objected to be admitted, *pro* and *con*, it would not materially change the facts of the case.

Where bills of exception have been taken by both parties, and where all the evidence objected to might have been admitted, without materially changing the facts, the Supreme Court will not examine the correctness of the decision of the judge *a quo*, upon any of the bills of exception.

The defendants being in possession of the cotton, and having shipped it in their own names, and marked with the initial letters T. K., which are those of the names, it must be presumed to be their property, unless the contrary be clearly established. The claimant is in the situation of a person who is bound to make out a clear title, against the presumption which exists in favor of the possessor. This, we think with the court below, he has not done.

Cotton in the possession of a certain person, shipped by him, and marked with the initials of his name, must be presumed to be his property.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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ZACHARIE ET ALS. vs. O'BEIRNE ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A mortgage on one third of a certain steamboat was given in Kentucky, to secure the mortgagee residing in this state, for advances made and to be made here for the mortgagor; the mortgage was forwarded to the mortgagee, to whom the boat was consigned, and in whose possession she was when attached. *It was held* that this was an inchoate mortgage, to take effect only on the acceptance of the mortgagee, that it is to be governed by the laws of this state, and that not having been duly recorded here, it cannot have effect against the creditors of the mortgager.

The consignee has no privilege on a steam boat for monies which he has advanced on the boat.

An opposing creditor cannot urge a claim in the Supreme Court which was not stated in his opposition in the inferior court.

On the 23d of March, 1833, J. W. Zacharie & Co. instituted a suit by attachment against the defendants. Among the property seized under the writ was the defendant's interest in the steam boat Watchman.

It appears that O'Beirn, Shannon and Baldwin were in partnership, that they owned one third of the Watchman, and that on the 25th of September, 1832, Baldwin sold out to O'Beirne & Shannon, the new firm. On the 8th of November, 1832, a new enrollment of the Watchman was issued, by which it appears that John Harrington, Joseph Barbour, John O'Beirne and Patric Shannon, are the owners. There is an endorsement that Harrington, on the 19th of September, 1832, has mortgaged his interest to O'Beirne, Baldwin & Co., to secure one thousand four hundred thirty-nine dollars and fifty cents.

On the 3d November, 1832, O'Beirne & Shannon wrote to Sloo & Byrne as follows:

"We have this day valued on you in favor our mutual

friends, Messrs. Stewart & Sloo, at four months, for three thousand eight hundred dollars, predicated on an arrangement of our interest and claim on the steamer Watchman, which bill you will please honor and debit us with. The boat is consigned to your house; her original papers, accompanied with a power of attorney, &c., will leave about the 7th. We will write you fully our views, and submit her future destination to your discretion."

On the 9th of November, 1832, O'Beirne & Shannon addressed to Sloo & Byrne a letter, fromw hich the following extracts are taken:

"Mr. Robinson will hand our mortgage to you on one third of the boat, also the mortgage we hold on Capt. Harrington, 3d., and her enrollment, which you will please hold until you receive from us Mr. Barbour's power of attorney to sell his third. We are desirous that the boat, until you are fully prepared to effect a sale, should be kept below, and put snto some trade, where she might, in your judgment, make something. We have her insured here for one month from this date, leaving it with you to effect insurance at New-Orleans in the sum of eight thousand dollars, if practicable, after the 9th of December next, being the day on which the policy here will expire.

"If you can obtain at the rate of seven thousand five hundred or eight thousand dollars for two thirds of the boat, with the amount of our mortgage on Harrington's third added, we would be willing to sell; in any disposition you make, the owners will settle our account here with each other, you giving us an account current to date of sale. Capt. Harrington will comply with any advice which you may be pleased to give, as to the trade and destination generally. We refer you to Mr. Robertson for further particulars."

There is a power of attorney to sell, also a mortgage to Sloo & Byrne, of one third of the boat, and an assignment of Harrington's mortgage, dated 8th of November, 1832. These papers are drawn in the common law form. The mortgage was to secure payment of the draft and any future advances or acceptances.

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ET AL.

On the institution of the attachment by J. W. Zacharie & Co., an opposition was filed by Sloo & Byrne, alledging preference by mortgage, a delivery of the boat into thei possession, and the amount of their claim under it.

The plaintiff had judgment for four thousand one hundred ninety-eight dollars and eighty-three cents, against John O'Beirne and Patrick Shannon. The opposition was dismissed.

After an ineffectual attempt to obtain a new trial, the opponents appealed.

Worthington, for opponents and appellants, contended that:

1. The judgment below was erroneous, because the opponents were as mortgagees in possession, entitled to a privilege on the steam boat *Watchman*, according to the terms of the mortgage.

2. Because as consignees, even, they would be entitled to a privilege for advances.

3. Because as separate creditors of O'Bierne & Shannon, in whom the title reposed, they were in equity to be preferred to the creditor, of O'Beirne, Baldwin & Co.

Strawbridge, for the plaintiffs and appellees.

MARTIN, J., delivered the opinion of the court.

In March, 1833, the present suit was instituted by a process of attachment, which was levied, among other property, on the interests of the defendants, O'Beirne, Baldwin & Shannon, in the steam boat *Watchman*. The third of this boat being the property of these three defendants, who were partners in trade, Baldwin, in September, 1832, sold to his partners his interest in her, and withdrew from the partnership. By a new enrollment, taken out in November following, it appears that the boat was owned by Harrington, Barbour, O'Beirne & Shannon, and an endorsement

attests that Harrington's share had, in September, 1832, been mortgaged to O'Beirne, Baldwin & Shannon, to secure a sum of one thousand four hundred and odd dollars. In November, 1832, O'Beirne & Shannon wrote to Sloo & Byrne that they had drawn on them for three thousand eight hundred dollars, predicated on an arrangement of their interest in and claim on the boat, which was consigned to them, and her original papers with a form of attorney would be forwarded. Three days after, O'Beirne & Shannon wrote to Sloo & Byrne that Robinson, who appears to have been the clerk of the boat, would hand them their mortgage as well as that of Harrington's, and the enrollment; that Barbour would send them a power of attorney to sell his third. They requested that till a sale of the boat could be affected, she might be kept below in some useful trade, and Harrington would agree to any destination they might make of her. All this happened in Louisville, Kentucky. The boat afterwards came to New-Orleans, and here the interest of O'Beirne, Baldwin & Shannon was attached in the present suit.

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Sloo & Byrne filed their petition of intervention and opposition, and entered their claim as mortgagees of the third owned by O'Beirne & Shannon, and assignees of their mortgage of the third owned by Harrington.

Their opposition was dismissed, and they appealed.

They complain of the judgment of the District Court.

1. Because it disregards the privilege they were entitled to as mortgagees in possession.

2. As well on that which as consignees they had for their advances.

3. Because as creditors of O'Beirne & Shannon, they are to be preferred on the property of that firm, to those of O'Beirne, Baldwin & Shannon.

1. It does not appear to this court that the first judge erred in disregarding the claim of privilege under the mortgage given O'Beirne & Shannon of their third of the boat. The contract between three of the appellants, took effect on the assent given by the appellants in this state; till then,

A mortgage on one third of a certain steam boat was given in Kentucky to secure the mortgagee, residing in this state, for advances made and to be made

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here for the
mortgagor; the
mortgage was
forwarded to the
mortgagee, to
whom the boat
was consigned,
and in whose pos-
session she was
when attached. It
was held that this
was an inchoate
mortgage, to take
effect only on the
acceptance of the
mortgagee, that
it is to be govern-
ed by the laws of
this state, and
that not having
been duly record-
ed here, it cannot
have effect
against the cred-
itors of the mort-
gager.

The consignee
has no privilege
on a steam boat
for monies which
he has advanced
on the boat.

An opposing
creditor cannot
urge a claim in
the Supreme
Court which was
not stated in his
opposition in the
inferior court.

the contract was an inchoate one only. Therefore, the clerk of the boat, to whom the documents were delivered, held them for O'Beirne & Shannon, who might have cancelled them at any time before they were received by the appellants. As a contract of mortgage, under the law of Louisiana, the mortgagees cannot avail themselves against third persons, because it was not recorded as required by the *Civil Code*, art. 25. The clerk of the boat appears to us to have been without any authority, express or implied, to act for the appellants, neither does he appear to have done any act or given any assent as their agent.

II. It does not appear that the appellants have any privilege on the boat, as consignees. The privilege of persons of this description, is confined to merchandise. *Civil Code*, art. 3214.

III. The claim of preference or privilege on the property of O'Beirne & Shannon, to the creditors of O'Beirne, Baldwin & Shannon, was not urged in the intervention or opposition, nor was it brought forward in the District Court, otherwise than by a motion for a new trial. The district judge thought it was too late, but observed, that the claim would not have prevailed, if insisted on in a new trial. The plaintiffs might have shown that on the dissolution of the old firm, the new one assumed the payment of the debts of the former. In this opinion we concur.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

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CELIS ET AL. vs. ORIOL ET AL.

CELIS ET AL.
vs.
ORIOL ET AL.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

Where it is proved that certain persons, who claim an estate, are the legal heirs of its deceased proprietor, they will be considered his only heirs, unless it is shown that others exist.

Where a register of baptism proves that a child was christened by the name of "Francisco Antonio," and a register of burials attests the interment of a person named "Francisco," and no question as to the identity was raised in the inferior court *It was held* that the person whose death was attempted to be proved, must be considered the one whose death, according to the pleadings, it was important to establish.

This action is brought against the widow, children and heirs of Pedro Leon y Collantes, to recover the sum of five thousand dollars.

The plaintiffs allege that they are the only surviving heirs of the late Antonio Francisco Diez de Celis, their brother, lately of Havana, in the island of Cuba, and who died in the same place, in the month of August, 1829, a bachelor; his father and mother having previously died.

That the community formerly existing between Don Pedro Leon y Collantes and Dona Maria Cipriana Medina, his wife, was indebted at the time of the death of Leon y Collantes and of Maria Cipriana Medina, to the said Diez de Celis, in the sum of five thousand dollars, for the settlement of divers commercial transactions, which had taken place between Francisco Diez de Celis and Pedro Leon y Collantes.

The defendants excepted to the petition on the following grounds: 1. Because by the documents filed with the power, it does not appear that the deceased, Diez de Celis, has not left forced heirs. 2. Because the power of attorney does not authorise Antonio Maria de Miranda to sue for and claim

EASTERN DIS. the sum stated in the petition, before the tribunals of this state.
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CELIS ET AL.
vs.

ORIO ET AL.

The exception was overruled, the court considering that the power of attorney authorises to sue, that there is sufficient proof that Diez de Celis died without leaving forced heirs, and that being far advanced in age, he would not have lawful ascendants at the time of his death.

The general issue was then pleaded.

It was admitted that the sum of five thousand dollars, mentioned as having been at Cadiz, is now in the possession of said Oriol. Also, that Francisco Diez de Celis died in Havana.

Felix de La Mora, a witness for the plaintiff, testified that he had been acquainted for thirty years with Francisco Diez de Celis; that the said Francisco Diez de Celis has never been married, and that said Celis always told him that he was a bachelor; that deponent, was a particular friend of said Francisco Diez de Celis, and had he been married witness would have known it; that said Celis came here with him from Matamoras, in the month of June, in the year 1829, and went from thence to Havana, where he died.

He also testified, that when Francisco Diez de Celis was administrator in chief of the estates and plantations of the Count de Perez Galvez, in Mexico, Pedro de Leon y Collantes was under his orders in said administration; that afterwards the said Celis and Collantes entered into a partnership in Mexico, for conducting business for themselves. That one day, being in New-Orleans, in company with Celis and Collantes, Collantes remarked to him that it was a pity they had been expelled from Mexico, where they had been continually in danger of their lives, and to be in this country, when he had funds in Spain of his own, and also some belonging to that poor old man, pointing at Celis, who was also conversing with them.

The judge *a quo* being satisfied that Francisco Diez de Celis, who died at Havana, was the one to whom Collantes owed the five thousand dollars claimed, and that the claim-

ants were his heirs, decreed that the plaintiffs recover from the defendant the sum of five thousand dollars.

The defendants appealed.

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Canon, for the plaintiffs and appellees, contended:

1. That the judgment of the inferior court ought to be affirmed as to the sum which the appellants have been condemned to pay to the appellees.

2. But that the judge of the first instance ought to have condemned the appellants to pay the legal interest on the sum of five thousand dollars, from the day of the institution of the suit up to the satisfaction of judgment, the claim in this case being a liquidated one.

De Armas, contra, contended that:

1. The declaration of the widow Collantes in her last will, that the sum of five thousand dollars due by her husband, is not a sufficient proof that the said sum was due by her deceased husband.

2. The individual identity of the "Celis," who died at Havana, is not proved sufficiently.

3. There is no sufficient proof that those who claim are the only heirs of Francisco Antonio de Celis.

MARTIN, J., delivered the opinion of the court.

The petitioners, as sisters and heirs of Antonio Francisco Diez de Celis, claim a sum of five thousand dollars, as due him by the community which formerly existed between the parents of the defendants. The general issue was pleaded, and the defendants, appellants from the judgment which was rendered against them, ground their hope of its reversal on the following points:

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1. The petitioners have not proved that they are the *only* heirs.

2. Nor the identity of the person who is proved to have died at Havanna, with their ancestor.

3. The claim is not sufficiently proved, as the only evidence of it results from the declaration of the defendants' mother, in her last will.

I. The petitioners appear to be the sisters of the person whose estate they claim; they have produced extracts from the registry of burials in Spain, attesting the death of his father and mother. They have shown, as far as a negative is susceptible of proof, that their brother was never married, and the certificate of his burial in Havana, attests that he died a bachelor. The petitioners must, therefore, be *his only* heirs, unless he left a brother or other sister, or the issue of such. This is neither alleged nor proven.

II. The petitioners claim the estate of Antonio Francisco Diez de Celis; they have produced an extract from the registry of baptisms in Spain, attesting that in the year 1759, a child was christened by the name of Francisco Antonio Diez de Celis, and an extract from the registry of burials at Havana, attesting the interment of Francisco Diez de Celis, aged about seventy-two. The statement of facts contains an admission of the death of Francisco Diez de Celis, in Havana, and his death is also proved to have taken place in that city. No question appears to have been raised in the Parish Court on this point, and we must conclude that the person whose death was attempted to be proven, and is admitted by the statement of facts, is the one whose death, according to the pleadings, it was important to establish.

The defendants' mother, who died after their father, declares in her will, that no step was taken to establish by mortuary proceedings the state of the affairs of the community; she declares that the property belonging thereto, and particularly that her husband had in Cadiz a sum of five thousand dollars, belonging to Francisco Diez de Celis. A

When it is proved that certain persons who claim an estate, are the legal heirs of its deceased proprietor, they will be considered his only heirs, unless it is known that others exist.

Where a register of baptism proves that a child was christened by the name of "Francisco Antonio," and a register of burials attests the interment of a person named "Francisco," and no question as to the identity was raised in the inferior court. It was held that the person whose death was attempted to be proved, must be considered the one whose death, according to the pleadings, it was important to establish.

witness avers that he heard the husband of the deceased say he had a sum of money in Spain belonging to Francisco Diez de Celis; and the executor of said husband declares that after the death of his testator, he had the said sum of five thousand dollars brought over from Cadiz, and it is admitted in the statement of facts, that this sum of five thousand dollars is now in the hands of the husband of one of the defendants.

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It does appear to us that the defendants have entirely failed in establishing any of the grounds on which they attempted to induce us to interfere with the judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed, with costs in both courts.

BEAL vs. M'KIERNAN.

APPEAL FROM THE COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

The Louisiana Code has preserved all the principles, which before its promulgation prevented a commission merchant, who had an order to purchase cotton, to apply his own cotton thereto.

A. directs B. to buy and ship cotton; B. has cotton of his own and determines to ship it. This creates no agreement, obligation, contract, or sale.

The agent, like the principal, may buy from any person, not prohibited by law, but neither can buy from himself.

A. has an order from B., to purchase cotton, and from C. to sell his crop: he determines on selling C's cotton to B. The price has been determined by one person only; there is not that concurrence of two minds, *aggregatio mentium*, which is essential to the formation of the contract.

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bankers to lend or place money, but simply to procure sales or loans. They negotiate bargains, carry communications to and from the parties respectively, and they or their agents conclude the bargains.

The commission merchant who undertakes to fill an order, with cotton which he has to sell, assumes inconsistent duties.

The plaintiff claimed of the defendant the sum of three thousand eight hundred and nine dollars and eighty-five cents, the amount of loss on a shipment of cotton.

The plaintiff alleges that on the 6th June, 1831, B. M'Kiernan, acting for himself and John M'Kinley, doing business in commerce, as partners, requested the plaintiff by writing, to purchase for them five hundred bales of cotton, of such quality, and at such prices as he might think best for their interest, and to ship the same to Liverpool; the plaintiff being requested and required to advance the purchase money, and M'Kiernan and M'Kinley promising in case of loss on the adventure, to repay to the petitioner on demand, but in case of a profit, then to be authorized to draw on the latter at sight, for the same.

That at the date of the instructions M'Kiernan and M'Kinlay had in store with the plaintiff, sixty-two bales of cotton, which by said instructions he was authorised to sell, or ship to Liverpool, as he should think proper.

That he complied with said instructions, in purchasing four hundred and ninety-nine bales of cotton; that he thought it best for the interest of M'Kiernan and M'Kinlay, that the sixty-two bales stored should be shipped, and accordingly the whole were shipped to Liverpool, and there sold at a loss.

The defendant pleaded the general denial. He admitted that he gave an order in writing to the plaintiff, to purchase and ship cotton, but averred that the same was afterwards revoked, and a verbal order given, limiting the price of the cotton, and fixing the quality to be purchased. He averred that in the written order a limitation was originally fixed for the price, but at the request of the plaintiff, the same was, on

making a copy thereof, omitted, and the plaintiff agreed to make the purchase under a subsequent verbal order, which revoked the written one.

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That the plaintiff did not comply with his instructions, but violated them, with a view of benefiting himself at the expense of the defendant; and instead of purchasing cottons, really shipped his own, pretending he had purchased for defendant. That the weights of the said cotton were not correct, but the same were charged in New-Orleans for more than the real weight, and the weights in Liverpool were less than those charged in New-Orleans.

The case was submitted to a special jury.

Banks testified that acting as a broker, he made the selection of the cotton, at the instance of *Beal*. Witness went through *Beal's* whole stock, he conscientiously fixed the price of this cotton himself, at the same price that he was buying from *Beal*, for other persons, and in which he was himself interested; he considered the price as low as possible; he could not have executed the order at better terms; the market was swept at that time of all the cotton of that kind that was offered at that price. Witness went at all the usual places, and he advised *Beal* to sell his cotton. Others offered their cotton at a higher price, and none at a lower one. *Beal* had not restricted witness to his own cotton. Witness knew he was buying the cotton for *M'Kiernan* and *M'Kinlay*, *Mr. Beal* said so to him when he gave him the order. Witness did not know to whom the cotton belonged; does not recollect who weighed the cotton, it; was one of the public weighers.

Witness had no authority from *M'Kiernan* and *M'Kinlay* to buy the cotton, all that he knew about it was from *Beal*. *Beal* paid the brokerage to witness. Witness never knew those cottons to be sold at a lower price in New-Orleans; the market was then much depressed. Witness never advised *M'Kinlay* and *M'Kiernan* that he had bought this cotton on their account.

Dunn testified that he was in the counting house of

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Beal about the latter end of December, 1831, when a conversation took place between plaintiff and defendant, about the sale of this cotton in Liverpool. M'Kiernan said to Beal. "Well Beal, what will you take to let me off?" "Nothing," answered Beal, the cotton was shipped on your account, if there be any profit, you shall have it, but if any loss occurs, you must stand it." No returns of sales had been received, but letters of advice had been, showing the rates at which cottons were then sold.

In April, 1832, after M'Kiernan had had in his possession for several days, the account current of the sales, he stated that as regarded the calculations, he took them for correct, and complained only of the extravagance of the charges in Liverpool.

Yeatman, a witness for defendant, testified that the plaintiff admitted in his presence, that the cotton, was cotton which he had the selling of, and over which he had the whole control, but witness did not understand Beal to mention that it was his individual property. There was no precise expression made use of, but witness, from the conversation, understood that it was cotton consigned to him for sale.

The counsel for the defendant requested the judge to charge the jury:

First, That no co-partners, except commercial co-partners, are bound in *solido* for the debts of the co-partnership contracted in this state.

Second, That an agreement to purchase a single lot of cotton by two individuals, for resale, will not of itself constitute a commercial partnership.

Third, That if the jury believe from the evidence, that the defendant M'Kiernan, was not in commercial co-partnership with M'Kinlay, then the defendant is liable for one-half only of the debt fixed on.

Fourth, That in joint obligations, by all except in commercial co-partnerships, all the obligors must be sued, or the plaintiff must fail.

5, That a commission merchant, under an order to purchase cotton, cannot fill that order by applying his own cotton to the purpose of the order, nor the cotton of others consigned to him to sell, neither by himself or through the intervention of a broker, and therefore, if the jury believe that the four hundred and ninety-nine bales of cotton, applied to the order to purchase in this case, either belonged to Wm. Beal himself, or had been consigned to him, and was then in his hands to sell on commission, and that Banks and Kincaid had no authority from the defendant to buy, except what they derived from the plaintiff, they should find for the defendant.

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Which charge the court refused to give, but charged the jury as follows :

First, The connexion between M'Kiernan and M'Kinlay, comes within the definition of commercial partnerships, for it was formed for the purchase of a personal property, to wit: cotton, and the sale thereof. *Civil Code*, 2795, 2806. It was an association in participation or commercial speculation for joint account, which comes within the definition of commercial partnerships, and were probably those which the authors of our Code called special, and which were to be regulated by the contemplated Code of Commerce, which has never been enacted. *Favadr de Langlade Societé*, vol. 5, 241, 242. In commercial partnerships, by our laws, solidarity exists.

Second, By our law, as it now stands, all persons may buy or sell, except those interdicted by law. 2420 *et seq.* No law, in this state, interdicts a person who, as agent of one, is charged to sell property, to purchase it for another person. On the contrary the law contemplates a double agency, *Civil Code*, 2985, 2986.

Third, Even had not Beal the right to purchase for M'Kiernan the cotton which he was charged to sell for others, the jury may inquire whether there was at any time a ratification of the transaction by M'Kiernan.

To which charge so delivered, and also to the refusal to give the charge requested by the defendant's counsel, the defendant excepted.

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The plaintiff had a verdict and judgment, and the defendant appealed.

Strawbridge, for plaintiff and appellee.

McCaleb and *Gray*, on the same side, made the following points.

1. Beal might purchase from himself for another. He was not governed by the law of agents, trustees, curaors, &c., who are prevented by law from purchasing for themselves, property confided to their care.

2. There is this difference between the cases reported, and Beal's, that in the former the agent or trustee has purchased from himself for himself, in the latter Beal purchased from himself for another. *Curia Philippica Factores*, N. 16. *Pothier Vente*, no. 13, D. 18, 1, 34. 7 *Contrat Empt. Campbell vs. Walker*, 5 *Vesey*, 678. 1 *John. Rep.* 394. 4 *Ves.* 411. 6 *Ves.* 624. 4 *N. S.* 267. 2 *Miller*, 69. *Scott vs. Calirt*. The reason of the law prohibiting purchases by persons acting in a confidential character, shows the entire difference between this case and those decided upon the principle alluded to.

3. If then the cases reported are different from the present, is the principle of the former so strictly applicable as renders it incumbent upon the court to extend it to this? Clearly not. The reasons are: First, The temptations and opportunities of fraud. Second, The incompatibility between the interests of seller and purchaser. Third, The advantages which the confidential situation gives. *Curia Philippica Factores*, no. 16. *Pothier de Vente*, no. 13, D. 26, 8, 5, 3 *de auc. et cons. pet.* 3 *Vesey Rep.* 759, *Whitchole vs. Lawrence*. *Campbell vs. Walker*, 6 *Vesey*, 678. *Fox vs. Mackrett*, 2 *Br. Ch. Rep.* 400. 4 *Bro. Parl. Ca.* 258. *Greer vs. Walker*. 1 *John. Chanc. Rep.* 27.

4. Is there any temptation to fraud here? He is a disinterested agent for both parties, allowed by law and made in many cases, art. 2002. *Cod. de Nap.* *Pothier Mandat n.*

82. *Liver on Agen.* vol. 1, 41. *Marshall on Insurance*, 498. *Abbott on Shipping, Auctioneer, captains and brokers*, are the agents for both parties.

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5. No incompatibility exists, because he is disinterested and acts conscientiously for both parties; acts through brokers.

6. By the *Civil Code*, all persons may buy except those interdicted by law, 2420. See *Code Civil de France* 60. *Siery, Trait de Vente* art. 1596, p. 571, for the difference between the two, evidently designed.

7. But such purchases are not *ipso jure* void, but only voidable at the election of the party whose property is purchased, 5 vol. 678. 80 *Pothier du Vente*, no. 13, 11. 3 *Ves.* 750. *Liver on Agency*, vol. 1, 21. The consignor might object, not M'Kiernan, unless he proves fraud.

8. And if ratified, either expressly or tacitly, they become perfectly valid. *Campbell vs. Walker*, 5 *Ves.* 680. *Pothier de Vente*, no. 14. *Toullier* tom. 8, 701, 19, 517. *C. Code*, 1805. *Paley's Law of Principal and Agent*, 143.

9. One transaction, joint purchase and sale, is sufficient. *Kent's Com.* vol. 3, p. 3, 4, 5, 13. 8 *Serg. and Rawle* 103. 12 *East.* 421, cited in *Kent.* p. 13. A participation in profit or loss, or holding out to the world as partners, so as to induce others, &c., renders a person responsible. *Kent* vol. 3, p. 4. 16 *East.* 173. 1 *Wash. C. C. R.* 491. *Hourquebies vs. Gerard's adm'r.*, 1 *Wash. C. C. R.* 164, 112. *Montague on Partnership*, vol. 1, p. 4, 27, 33, 57. *Gow on Partnership*, 12, 15, 239. *Civil Code*, 2796, 2806. *Pothier on Obligations*, vol. 1. p. 148, art. 13, sec. 2.

10. But though there were no decisions on the subject, the reasons given for the solidarity of commercial partnership, would make this a commercial partnership. *Pothier.* tom. 2. *trait du contrat de soci.* C. 6, N. 96, p. 568. *Code of Nap.* 1682. *Favard Langlade Societé*, c. 3, sec. 1, s. 4.

11. If one of several co-obligors is sued, he may take advantage of the omission to charge the other, provided he plead in abatement, and give the plaintiff a better writ; but he cannot take advantage of it on the trial. *Jordan vs. Wilkins*, 3 *Wash. C. C. R.* 110.

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12. This cause should not be remanded on account of the charge of the judge *a quo*. *Miller vs. Pierce*, 3 N. S. 284. *Hewls vs. Barron*, 7 N. S. 134. *Coote vs. Cottin*, 5 La. Rep.

Hennen, contra.

1. The charge of the judge on the facts, expressing his opinion in relation to them, and how far a partnership had been proved, &c. &c., was contrary to the *Code of Practice*, art. 516.

2. On the law, the charge of the judge was erroneous. First. The plaintiff, Beal, could not act in the double capacity of seller and purchaser of the cotton, though acting as consignee. 1 *Paley's Principal and Agent*, 32, 35. 1 *Hovenden on frauds*, 145, 148. 1 *Hovenden's Vesey*, 197. Note to case of *Massy vs. Davis*, 2 *Vesey, Jr.* 317.

3. The partnership between the defendant, M'Kiernan and M'Kinlay, was special not commercial. A single act of buying and selling, will not constitute the character of a merchant. 1 *Pardessus*, p. 100, no. 77, 78. 2 *Delvincourt*, p. 1, note 1, and p. 11, note 2. Commercial copartnership defined, *La. Code*, art. 2796. There is no copartnership where different persons send out in a ship, articles to be disposed of by the captain, and the profits to be shared.

4. Beal could not purchase for the defendants the property entrusted to himself for sale, by the consignors of it, he being their trustee, agent, factor. 1 *Hovenden on Frauds*, 473, 475.

5. Interest was illegally and improperly allowed in the judgment, the debt being unliquidated. *Code of Practice*, 553, 554.

MARTIN, J., delivered the opinion of the court.

The defendant and appellant has placed this case before us, principally on a bill of exceptions to the refusal of the first judge to instruct the jury, that a commission merchant having an order to purchase cotton, cannot apply thereto

cotton of his own, nor that of another consigned to him for sale, although he does so through the interference of a broker. Instead of which instruction, the judge told the jury, that by our law, as it now stands, all persons may buy and sell, except those who are prohibited by law. *Louisiana Code, 2420 et seq.* That no law in this state forbids an agent charged with the sale of property, to buy for a third person, on the contrary, the law contemplates a double agency. *Ibid, 2985, 2989.*

The counsel has introduced a considerable number of authorities, to establish the converse of the proposition of the Parish Court.

On the part of the plaintiff, the correctness and weight of these authorities have not been denied; it has been simply urged, that the principles of law, which the counsel for the appellant invokes, if they ever were in force in this state, are absolutely abrogated by the part of our Code, to which the judge has referred the jury. It will, therefore, suffice, in the examination of the question in controversy, to ascertain what change our late Code has introduced in the pre-existing laws.

It is true, that under our Code, every person not prohibited by law, may buy and sell, so might any one before.

Our Code has preserved all the principles, which before its promulgation prevented a commission merchant, who had an order to purchase cotton, to apply his own cotton thereto.

A sale is a contract. *Ib. 2413.* A contract is an agreement, by which one person obligates himself to another. *Ib. 1754.*

An agreement, *aggregatio mentium*, one person bound to another, are of the essence of every contract, and, consequently, of every sale. Where there is but one person, there can be no agreement, no obligation; for there is not the concurrence of two minds, no one person bound to the other.

A sale is perfect as to the parties, as soon as there is an agreement on the object and the price; and the property is vested in the purchaser, although the object be not delivered nor the price paid. *Ibid, 2431.* Then the sale is not effected till there be an agreement.

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The Louisiana Code has preserved all the principles, which before its promulgation prevented a commission merchant who had an order to purchase cotton, to apply his own cotton thereto.

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A directs B to buy and ship cotton; B has cotton of his own, and determines to ship it. This creates no agreement, obligation, contract, or sale.

A directs B to buy and ship cotton. B has cotton of his own, and determines to ship it. This creates no agreement nor obligation, no contract, no sale. There has not been the concurrence of two wills, and till then B is not bound, for he has it in his power to prevent the use of the obligation, if he change his mind. The faculty in the person bound to dissolve his obligation at pleasure, is incompatible with the existence of the obligation.

If, according to our law as it now stands, a commission merchant having an order to buy cotton, cannot apply his own thereto, it is not because he cannot buy from any person not prohibited by law, but because he cannot buy except from another who agrees to sell; therefore, he cannot buy from himself.

The Parish Court, in our opinion, erred in declining to instruct the jury, in the mode requested by the defendant's counsel.

It is contended that the charge which he substituted, was equally erroneous.

The Parish Court's proposition is, that no law in this state forbids an agent charged to sell property, to buy it for a third person.

Every argument in favor of the charge requested, militates against that which was substituted.

The agent, like the principal, may buy from any person not prohibited by law, but neither can buy from himself.

The agent, like the principal, may indeed buy from any person (not prohibited by law), who may agree to sell, but neither can buy from himself. Every sale to have effect, must be attended with all the requisites of the law, among these is the agreement of *two* persons on the object and the price.

X A has an order from B to purchase cotton, and from C to sell his crop; he determines on selling C's cotton to B. The price has been determined by one person only; there is not that concurrence of two minds; *aggregatio mentium* is essential to the formation of the contract.

A has an order from B to purchase cotton, and from C to sell his crop; he determines on selling C's cotton to B. The price has been determined by *one* person only; there is not that concurrence of two minds; *aggregatio mentium* is essential to the formation of the contract.

The Parish Court has believed; that its proposition can be supported by what our Code calls a double agency.

In the third chapter of the title of the *Contract of Mandate*, EASTERN DIS. April, 1834. the *Code* professedly speaks of the *mandatary*, or agent of both parties.

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This person is the broker or intermediary, who is employed to negotiate a matter between two persons, and who, for that reason, is considered as the mandatary of both, 2985. They are not answerable, except in case of fraud, for the insolvency of those for whom they procure sales or loans, 2988.

They are not like commission merchants or bankers, to buy or sell, or to lend or borrow money, but simply, in the language of our *Code*, to *procure* sales or loans. They aver fidelity to both parties, and must favor neither more than the other, 2987.

Brokers are not like commission merchants to buy or sell, or to lend or borrow money, but simply to procure sales or loans. They negotiate bargains, carry communications to and from the parties respectively, and they or their agents conclude the bargains.

They are not like the commission merchants, who *effect* sales and purchases; nor like bankers, who lend or place money. We have an example of this distinction in the present case. The plaintiff, as commission merchant, was employed by the defendant to *effect* a purchase, and he employed a broker to go in the market and *procure* a vendor.

The broker negotiates the bargain, he carries communications to and from the parties respectively, and they or their agent, conclude the bargain.

The auctioneer, it is contended, is a double agent, and acts for both parties. That he is the agent of the vendor, cannot be denied, for it is in that capacity that he receives the last and highest bid. The sale is effected by the agreement of both parties, the assent of the owner to the proposition or offer of the bidder.

It is not only in a legal but also in a moral point of view, that the application of one's cotton, or that of others which he has to sell, to an order to purchase, is to be reprobated.

The person who gives the order, expects that in consideration of the commission with which he is charged, he has acquired a right to the faithful services of the commission merchant, whose best skill and industry are to be exerted in procuring a purchase at the lowest price in the market. If the latter uses his own cotton and place it at

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The commission merchant who undertakes to fill an order, with cotton which he has to sell, assumes inconsistent duties.

the medium price, the commission is improperly charged, for it requires much less labor to fix this medium price than to search for the best article, seek such purchasers whose necessity to sell, may compel to accept the lowest price of the market; and suspicion will always exist, that the price which is charged by the owner, is not that which is the most advantageous to the purchaser.

The commission merchant who undertakes to fill an order with cotton, which he has to sell, assumes inconsistent duties. He has engaged to the planter to afford him the benefit of his utmost skill, experience and industry, in choosing a proper moment to sell, in selecting the safest vendee, and obtaining the very highest price. For all this he expects a pecuniary compensation. He next has a similar reward from another person; engages to the latter that he shall have the benefit of the same skill, experience and industry, to defeat the expectations of the planter; that is to say, to dispose of the cotton when the price is at the lowest ebb, and for the very lowest price in the market.

It is impossible that a commission merchant who has bound himself under such incompatible obligations, can do justice to either of the persons by whom he is employed. If he take the middle course, and dispose of the cotton, at the medium price of the market, he violates his engagement to both, for on the one side, he was to obtain the highest, and on the other pay the lowest price, and he pockets a double reward, where he has performed neither of his obligations.

We conclude that the Parish Court, in our opinion erred, in allowing the charge which was substituted to the one he was requested to give.

The plaintiff's counsel has insisted, that the evidence establishes that the defendant, after he had knowledge that cotton, which the plaintiff had to sell, had been used in filling his order, promised payment, thereby ratifying sale and precluding himself from contesting the plaintiff's claim; that the verdict is fully supported by the testimony, and ought not to be disturbed.

The defendant's counsel has contended that his client prayed for a trial by jury, as he was entitled to demand it by law, and thereby acquired a right to a fair trial by his peers, uninfluenced by any erroneous expression of the law by the inferior court, that as juries ought to respect the opinion of the court on questions of law, their verdict was given in accordance thereto, and therefore, it is not probable they resorted to an examination of the plea of ratification, which the adverse counsel has no right to withdraw from the consideration of the jury, to submit it to that of the court, and he has therefore prayed us to remand the case for another new trial by jury.

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The power to remand a case, whenever this court thinks justice requires it, is general in the law which organized it. We have often exercised it. We have not, however, thought that every mistake of the first judge, in cases in which a jury had been asked, required us to remand. We have reviewed all our decisions on this point. They are found in 4 *Martin* 316. 5 *id.* 213. 12 *id.* 355. 1 *id.* N. S. 629. 2 *id.* N. S. 3 *id.* N. S. 284. 4 *id.* N. S. 72. 5 *id.* N. S. 51. 7 *id.* N. S. 134. 8 *id.* 167, 172 and 257. 6 *id.* N. S. 603. 1 *Louisiana Reports*, 174. 2 *id.* 390. 3 *id.* 469. 5 *id.* 410.

None of the principles, which have guided us in these cases militates against the defendant in the present. It is most probable that, misled by the charge of the court, they did not attend to the plea of ratification, which if they respected the directions of the judge, was absolutely unimportant. Counsel should never avail themselves of the bustle and hurry of a *nisi prius* trial, and the confusion consequent thereto, to obtain from a court composed of a single judge, to whom much time is not given for consideration, an erroneous expression of the law to the jury.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, the verdict set aside and the case remanded, with directions to the jury, that a commission merchant having an order to purchase cotton, cannot apply thereto, cotton of his

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own, nor that of another consigned to him for sale, and to refrain from telling the jury that no law in this state forbids an agent charged with the sale of property, to buy it for a third person. And it is ordered that the appellee pay costs in this court.

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APPEAL FROM THE COURT OF PROBATES, FOR THE PARISH AND CITY OF
NEW-ORLEANS.

The act of 1825, giving the District Court jurisdiction of *all* suits for the partition or sale of any property lying within its limits, does not deprive the Court of Probates of its jurisdiction, in a case where the property to be divided is owned by co-heirs, some of whom are minors residing out of the state.

This was an action for a partition. The plaintiff alleges that on the 13th day of April, 1821, Samuel McCutcheon and Moses Hooke bought three lots of ground situated in the parish of New-Orleans, being lots marked numbers seventeen, twenty and twenty-one; that on the same day, they made a partition of the same, whereby Hooke became possessed as sole owner of lot number twenty, and that part of lot number seventeen, which is in the rear of lots number twenty, and the half towards St. Charles street of what shall remain of lot number seventeen, after deducting therefrom all that part thereof which is in the rear of lots numbers twenty and twenty-one.

That on the day of September, 182 , Hooke died intestate in the state of Mississippi, without ever having resided in the state of Louisiana, leaving a wife, Harriet Hooke, to whom he had been married in the state of Missis-

issippi, and six children and heirs, to wit: the plaintiff Harriet Elmina Hooke, William Butler Hooke, Francis Fitz Henry Hooke, Richard Butler Hooke, and Moses Josiah Hooke.

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That the said property was purchased during the marriage of Moses Hooke with his said wife, and thereby was community property, in consequence of which, at his death one-half thereof became the property of Harriet Hooke, and the other half the property of their said children.

That on the sixth of September, 1826, Harriet Hooke married in the state of Mississippi with Frederick Avery Browder, and there resided until her death, in the year 1830, she dying intestate, and having had issue by the marriage, only one child, Jane Butler Browder, now a minor under the age of puberty; whereby the plaintiff with the five other children of the said Moses Hooke, and the said Jane Butler Browder, inherited from her the remaining half of the said parcels of ground.

That the succession of the said Moses Hook, and of the said Harriet Browder, were opened in the parish of New-Orleans, inasmuch as their principal property in the state of Louisiana, consisted in the lots of land above described.

That the plaintiff is desirous of making a partition of the said parcels of land last above described, but that the same cannot be divided in kind, without causing a diminution of their value.

That the said children of Moses Hooke, reside in the state of Mississippi, and no tutors or curators were ever appointed to them within this state, and that they are now minors wholly unrepresented; that Jane Butler Browder resides in the parish of Pointe Coupee, and Augustus Bourgeat is her tutor.

A curator *ad hoc*, was appointed by the court to represent the absent minors. He appeared and filed the following exceptions.

First. This court hath no jurisdiction in the matter, nor over the said defendants.

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Second. That a *curator ad litem* should have been appointed to the defendant, and the *curator ad hoc* has no power to act in the premises.

Third. That no family meeting is prayed for, therefore, the prayer of the petitioner cannot be granted, the consent of a family meeting being requisite therefor.

In case these exceptions should be overruled, the *curator ad hoc*, submitted to the court the interests of the absent minors in the premises.

Jane Butler Browder answered by her tutor, that she could not oppose the partition.

She alleged that the property of which partition is prayed, was purchased entirely with funds of her late mother Harriet Hooke, that a community of acquests existed between her and the late Moses Hooke, as alleged, but that the hereditary property of her mother, was not increased during their marriage. That she was entitled to one-seventh part of the property, the partition of which is prayed for.

The judge of the Court of Probates considered that the exception to its jurisdiction ought to be sustained; the thirteenth section of the act of March 25th, 1828, entitled "An act further amending several articles of the Civil Code and Code of Practice," giving exclusive jurisdiction to the District Court and the Parish Court of New-Orleans, in cases like the present, and ordered that the petition be dismissed.

The plaintiff appealed.

I. W. Smith, for plaintiff and appellant, made the following points.

1. The Court of Probates has *ratione personæ* the exclusive jurisdiction of this case. The defendants are minors, the property is situated in the parish in which the action was brought, and the succession of the ancestor of the parties was opened in that parish. *Code of Practice, art. 924, no. 14.*

2. The third section of the act of 1825, was abrogated by the *Code of Practice, art. 924, no. 14*, subsequently promulgated. If that section remains in force, it merely *confers* jurisdiction on the District Courts. The thirteenth section of

the act of 1828, refers only to partitions between co-heirs of full age. Minors are a privileged class, placed under the protection of courts of probate, which were established for their benefit, among other objects. These courts have the exclusive power to appoint legal representatives for them. They are not to be ousted of their jurisdiction, except by express enactment. *Code of Practice*, art. 924, sec. 2. *La. Code*, 1331. *Acts of 1825*, p. 122, sec. 3. *Acts of 1828*, p. 160, secs. 13, 25. 3 *La. Reports*, 483. *Roland vs. Stephens*.

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Preston and Hennen, contra.

BULLARD, J., delivered the opinion of the court.

The plaintiff demands the partition of a lot of land in this parish, belonging to the succession of Moses Hook, and alleging that some of his co-heirs are minors, residing out of the state, caused a curator *ad hoc* to be appointed by the court to which the petition is addressed.

The curator thus appointed, filed, 1st, an exception to the jurisdiction of the Probate Court; 2d, that a curator *ad litem* should have been appointed, and not a curator *ad hoc*; and 3d, that no family meeting had been prayed for in the petition.

The court sustained the plea to its jurisdiction, and the plaintiffs appealed.

By the article 924, No. 14 of the *Code of Practice*, it is declared that Probate Courts have exclusive power to ordain and regulate all partitions of successions in which minors and persons interdicted or residing out of the state are interested. If the question depended on the Code alone, the court would have not only jurisdiction, but exclusive jurisdiction of this suit. But it is contended that this jurisdiction has been taken away by the act of 1825, page 122.

The section of the act relied on, declares that the District Court shall have jurisdiction of all suits for the partition or sale of any property laying within their respective limits, and held in common by several owners, notwithstanding any or

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April, 1834. persons residing out of the state, &c.

COLLINS ET AL. This section does not contain any words from which we
vs. should infer that the legislature intended to confer exclusive
PORTER jurisdiction on the District Court in cases like this. Admitting,
ET ALS. for the sake of argument, that the 224th article of the Code,
 and this section of the act of 1825 refer to the same class of
 cases, nothing more would follow, than that the two courts
 have concurrent jurisdiction. The plea in this case cannot
 be sustained, unless the Court of Probates has been entirely
 ousted of jurisdiction. We are of opinion that it has not
 been, and that the court erred in sustaining the plea.

The act of 1825
 giving the Dis-
 trict Court juri-
 sdiction of all suits
 for the partition
 or sale of any
 property lying
 within its limits,
 does not deprive
 the Court of Pro-
 bates of its juri-
 sdiction in a case
 where the proper-
 ty to be divided
 is owned by co-
 heirs, some of
 whom are minors
 residing out of
 the state.

This view of the subject renders it unnecessary to inquire
 whether the above mentioned act of 1825 has been repealed
 by the act of 1828, section 25.

It is, therefore, ordered, adjudged and decreed, that the
 judgment of the Court of Probates be avoided and reversed,
 the exception to the jurisdiction overruled, and that the
 cause be remanded, with directions to the judge to proceed
 therein according to law, and that the appellee pay the costs
 of this appeal.

COLLINS ET AL. vs. PORTER ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The decision of the Supreme Court in the case of *Parker vs. Porter et als.*,
ante 169, confirmed.

This suit was commenced by attachment. The plaintiffs
 claimed the sum of seven hundred and seventy-six dollars,

They alleged that Porter, Stone & Co., being owners of the steam boats named the Long Branch, Watchman, William T. Barry, and the Star of the West, engaged in transporting freight and passengers from and to sundry ports in the gulf of Mexico and lakes Borgne and Pontchartrain, purchased for the necessities of said boats certain groceries and other merchandise from them at sundry times in the year 1833, and in the month of January, 1834; that within the said periods the defendants purchased many other articles of merchandise from the plaintiffs, that at the special interest and request of Porter, Stone & Co., they had made the defendants many advances of money for the payment of wages of the hands and officers on board of their boats, supplies of necessities for the boats, and for other purposes, and had paid many orders of Porter, Stone & Co., and of their agents, and several accounts against them for their credit to various individuals within the period mentioned.

The following order, signed by the judge *a quo*, was entered upon record two days after the petition was filed: "It having been made to appear to my satisfaction that the steam boat seized in the above entitled suit, viz: the Long Branch, is the steam boat transporting the mail from New-Orleans to Mobile, under contract with the government of the United States, the sheriff of the city and parish of New-Orleans is hereby ordered to discharge her from seizure forthwith."

The plaintiffs appealed from this order.

The following statement of facts was made by the judge. "The order of court releasing the steam boat Long Branch, attached in this suit, and entered on the minutes under the date of February 5, 1834, was made on the *ex parte* application of the defendants on the 4th of February, on the affidavit of Charles Walker, which was filed on the 5th of February. The affidavit was made out of the presence of the plaintiffs, and without their having an opportunity of cross examining the witness. It was sworn to before the judge at Chambers, and the order granted at chambers

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The affidavit referred to was in the following words: "Charles Walker being sworn, deposeth, that he is the master and commander of the steam boat Long Branch, belonging to the defendants in the above entitled suit; that said defendants have contracted with the Post Master General of the United States, to transport the United States' mail from New-Orleans to Mobile, and that the said steam boat Long Branch is now employed in transporting the said mail under such contract; that said steam boat has been seized and attached in the above suit, and is now in the custody of the sheriff of this court, who detains the same, and thereby impedes and prevents the transportation of said mail agreeably to her contract, and unless said boat be released and taken from the custody of the sheriff, said mail cannot be conveyed and transported at all."

Buchanan, for the plaintiffs and appellants, contended that:

1. This case turns upon the same principles with that of *Edward E. Parker vs. Porter, Stone & Co.*, decided lately by this court. The seizures of the mail boats under attachment, were made at the same time in the two suits, and the orders releasing the same were simultaneous.

2. The order of court releasing the Long Branch steam boat was illegal, as being made at chambers, and *ex parte*.

3. The order, releasing the steam boat Watchman, was contrary to law.

4. Improper evidence was admitted.

Carleton and Lockett, contra.

MATHEWS, J., delivered the opinion of the court.

This case is in principle precisely like that of *Parker vs. the same defendants*, which was decided during February term last, and must consequently receive a judgment similar to the one then rendered. *Vide ante*, 169.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; that the cause be remanded, to be proceeded in according to law, and that the appellees pay the cost of the appeal.

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APPLICATION FOR A MANDAMUS.

The judge *a quo* cannot withhold an order of appeal, on the ground of his consciousness that his decision is correct.

Although a party, against whom a judgment has been rendered, is unable to give security to prevent its execution, he may claim an appeal, if he judges it for his interest to prevent the decision *against* him from passing in *rem judicatam*.

To entitle a party to an appeal from an interlocutory judgment, it is unnecessary that the injury be *absolutely* irreparable. It suffices if it be such as would be irreparable by the final judgment, or the action of the Supreme Court on that judgment.

An interlocutory decree may be appealed from, which discharges the plaintiff's hold on the body of the debtor, and on the property sequestered or attached.

If an appeal be claimed within the legal delay, the judge *a quo* cannot refuse to allow it, because the judgment was rendered by his predecessor, who died without making a statement of facts.

On an application for the writ of *habeas corpus*, the decision of the judge upon matters of a criminal or political nature, is not examinable in the Supreme Court.

The writ of *habeas corpus* may be issued in civil, as well as in criminal and political cases.

CASES IN THE SUPREME COURT

In the case of Hyde & Goodrich *vs.* Jenkins, pending in the District Court of the first district, the plaintiffs moved the Supreme Court for a rule upon the judge *a quo*, to show cause why a *mandamus* should not issue, commanding him to grant the plaintiffs an order of appeal.

The counsel of the plaintiffs made affidavit, that a motion was made in this cause by the Deputy Attorney General, on whose suggestion it was ordered that plaintiffs show cause, why certain goods belonging to defendant, sequestered by the plaintiffs, and deposited with the clerk of the court, should not be delivered up to the proper agents on the part of the state of New York, who had been authorised to receive the defendant, a fugitive from justice from that state. That on the return of said motion, after argument, the judge of said district court directed the clerk to deliver up the goods to said agents; that the defendant was a fugitive from justice, and that it was considered also necessary to have the goods sent to the state of New York, in order to procure conviction of said Jenkins, charged in that state for a criminal offence. From this decision the plaintiffs prayed to be permitted to appeal to the Supreme Court. The judge declined granting an order of appeal, on the ground that it was a judgment from which an appeal could not be taken.

It appears that Jenkins was under arrest on civil process, at the suit of Hyde & Goodrich, for certain property by them alleged to be stolen from them by him in the city of New York. A sequestration was obtained for a watch alleged to belong to them in the possession of the Mayor of the city of New Orleans, and an attachment was also obtained by which certain property, more particularly certain gold coins found on the person, or in possession of said Jenkins, were ordered to be attached. When the process of attachment in this suit was served on the Mayor he declined giving up the property, and a rule being taken on him to show cause why an attachment should not issue against him for not doing so, and the above facts being made to appear to the satisfaction of the court, the rule

was discharged with instructions to the Mayor not to surrender said property to Jenkins, in case of his discharge; but in such case to hold them subject to the order of the District Court.

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On the 19th of March, 1834, on motion of the deputy Attorney General, and on suggesting to the court that a requisition had been made by the Governor of the state of New York, for the person of the defendant, as a criminal who had fled from justice, the court ordered the plaintiffs to show cause on Monday the 24th, why the defendant, who was then in the custody of the sheriff, should not be delivered up in pursuance of the said requisition, and the order of the Governor of this state thereon.

This rule came on for hearing before the court on the return day.

After hearing counsel the court ordered the rule to be made absolute. On motion of the deputy Attorney General, it was further ordered, that a writ of *habeas corpus* issue, directed to the sheriff of the parish of Orleans, requiring him to deliver up the person of the defendant, to the commissioners appointed by the Governor of the state of New York, to receive him, in pursuance to the order of the Governor of this state.

On the same day, on motion of the deputy Attorney General, and on suggesting to the court, that the property deposited with the clerk in this case, by the Mayor, was required for the conviction of the defendant, a fugitive from justice; it was ordered that the plaintiffs show cause on the following day why said property should not be delivered up for the purpose mentioned.

On the return of this rule, the court ordered it to be made absolute, and that the property, to wit: a gold watch be delivered up by the clerk.

On the 25th of March, on motion of the deputy Attorney General, it was ordered that the watches, foreign coin, and all the property (with the exception of bank notes, and current coin,) found in the possession of the defendant,

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and attached in the hands of the Mayor, at the suit of plaintiffs, be delivered up by the Mayor to the commissioners said watches, coins, &c. being necessary for his conviction. And it was further ordered, that the Mayor continue to hold the bank notes and current coin, attached, subject to the further order of court.

This rule was also made absolute, the court being satisfied of the truth of the matters suggested.

The Judge *a quo* assigned the following reasons for his refusal, to grant the appeal prayed for:

1. Had an application of a similar kind been made by any competent court of the state, for the person of said Jenkins, to try him on a criminal charge, this court would have ordered him, together with property found on him alleged to be stolen, to be delivered up, notwithstanding his being under arrest on civil process, with instruction to retain him in case of his discharge; the right of the state, and the necessity of enforcing criminal justice being paramount to the right of any private individual to arrest said Jenkins on civil process, or to the property stolen.

2. The right of the Governor of New York, to demand and receive him, and also the stolen property necessary to his conviction is also manifest under the constitution of the United States. Where there is presumption of theft, every thing of value found on the thief is presumed to be stolen.

3. The orders of the court in this matter have been executed. Jenkins and the property have been delivered up, and taken to New York, and plaintiffs can take nothing by their intended appeal; the court never considered the property as property within its control. The Mayor left the watch with the clerk to get rid of it.

4. These several orders were made on the motion of the Attorney General, on behalf of the state, contradictorily with attorney of plaintiffs. This was ordered not as a mat-

ter of legal necessity, but expediency; that plaintiffs might take steps to follow the person and property, or perhaps to ask of our executive to have prisoner remanded in case of his acquittal, but there is no party contradictorily with whom an appeal can be taken, as the state is not considered a party to the suit.

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5. There is no irreparable injury; the plaintiffs can follow the person and property to New York, at which place plaintiffs' own petition alleges it to have been stolen from them.

6. When these several proceedings were had, no copy of the warrant of the Governor of Louisiana for the arrest, nor authority of Governor of New York to receive his person, nor copy of process verbal of property found on Jenkins, or his person, was taken or embodied in the proceedings; the plaintiffs' attorney did not require the warrant of the Governor of Louisiana, nor the authority to receive him, which were produced to be copied, and the court did not think it necessary to order it *ex officio*, and therefore no complete record of the matters before the court, when the orders were made, can be made up.

Carter, for applicant relied on the following points, in support of his application for the mandamus.

1. The decision of the court below worked an irreparable injury, and hence the plaintiffs were entitled to an appeal. It is no legal answer to be told by the judge below, that inasmuch as we could follow the property which had been sequestered, into the state of New York, that no irreparable injury was done us. An irreparable injury was done, when the act of the judge of the First District Court, placed sequestered property beyond the jurisdiction of the courts of this state, as in this state is the residence of the plaintiffs; and they cannot be compelled to resort to the tribunals of the state of New York, for a recovery of those rights, which may be had before the courts of their own state.

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2. The reason assigned by the judge below, that a *mandamus* should not issue to him, "because the property had actually been delivered up, and hence we could obtain nothing by an appeal," is based upon most extraordinary grounds. It would seem then, that if the judge who dissolves orders by sequestrations, attachment, &c., can obtain the obedience of the individual or officers having possession of property thus situated, and have it removed out of the state, these steps afford a good ground to refuse an appeal. This is in direct opposition to the decision of this tribunal, which renders officers responsible for illegal acts. If the order granted in this cause, on an investigation of the merits should be found improper and contrary to law, the individual or officer who has directed it, will be responsible to the plaintiffs, for the loss and damage which such act may cause them.

3. If courts can evade granting appeals from orders dissolving sequestration, on the grounds, urged by the judge of the first district, these writs of sequestration, attachment and provisional seizure will cease to afford to creditors those privileges and rights, which the Code of Practice evidently intends. If a judge can refuse to grant an appeal from his decision, setting aside these orders, on the ground "that the property can be followed into another state, by the party applying for the appeal, and thence no 'irreparable injury' is done to him;" then a definition is given to the term "irreparable injury," as original in its character as it will be important and fatal in its consequences. Such a definition must greatly decrease the appellate duties of this tribunal, and leave that property upon which the law so plainly gives a creditor a provisional lien, at the mercy of dishonest debtors and capricious judges.

4. The judge below contends that we have no right to interfere in the order to deliver up the property; at every stage of the proceedings in reference to a disposition of this property, the plaintiffs appeared and made opposition to it, and on the rule for a delivery of this property to commis-

sioners, on behalf of the state of New York, we were duly notified of the motion, and an agreement took place. No objection was then made by the judge of the inferior court, to the contestation then made by the plaintiffs, and plaintiffs believe that this pretence of the court below cannot avail.

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MARTIN, J., delivered the opinion of the court.

On a rule to show cause why a *mandamus* should not issue to command the judge to allow an appeal from certain interlocutory orders lately made by him in the case of *Hyde et al. vs. Jenkins*, as prayed by the plaintiffs, he showed the following causes:

I. The plaintiffs had arrested the defendant on a charge of his having stolen property of theirs in the city of New York, and had obtained a writ of sequestration for a watch, alleged to be part of said stolen property, as well as an attachment. The mayor of New-Orleans, in whose office the watch, as well as a number of gold coins, found in the possession of the defendant when he was arrested, had been deposited, refused to deliver them, on a rule taken upon him why an attachment should not issue against him; but it appearing that the governor of the state of New York had required the arrest and surrender of the defendant, who had been indicted in that state for the theft, and that the property stolen and found upon him was to be sent with him in order to facilitate the discovery of truth at his trial, the rule was discharged, but the mayor was directed not to surrender the property to the defendant in case of his being discharged, but on such an event to retain it till the further order of the court.

Afterwards the attorney general obtained a rule against the plaintiffs to show cause why a writ of *habeas corpus* should not issue to the sheriff for the delivery of the body of the defendant to the proper persons authorised by the governor to receive and convey him back. On cause being

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shown, the rule was made absolute and the writ ordered to be issued.

Subsequently, on the suggestion of the attorney general, that the property found in the possession of the defendant at the moment of his arrest, was required to be used as means of conviction on his trial; and after hearing the plaintiffs' counsel, an order was made for the delivery of it by the mayor, except some bank notes and current coins. From these orders the plaintiffs prayed an appeal, which was refused for the following reasons:

1. Had an application of a similar kind been made by any competent court in this state, the District Court would have ordered the accused and the property alleged to have been stolen, to be surrendered, notwithstanding his body and the property was in the custody of the sheriff under writs obtained in a civil suit, with instructions to retain the body and property, in case of his discharge, so that both might be forthcoming to enforce the plaintiffs' claim; the rights of the state and the necessity of enforcing criminal justice, being paramount to the claim of any individual in a civil action. The right of the executive of a sister state to demand a fugitive from justice, and the property to be produced for the discovery of truth at his trial, is recognised by the constitution of the United States. Where there is a proper charge of theft, valuable property found on or in the possession of the accused, is presumed to have been stolen.

2. The orders of the court from which the appeal has been prayed have been executed, the defendant and property surrendered and are on their way to New York, and no appeal can be available to the plaintiffs. The orders were made on the motion of the attorney general, in behalf of the state, and contradictorily with the plaintiffs. The court considered the property as being within its control, and the orders were made not as a matter of legal necessity, but expediency. The plaintiffs may take steps to follow the prisoner and property, and perhaps ask of the executive of this state to require that the prisoner and property may be remanded, when the circumstances may require it. There

is no party present against whom an appeal may be taken, as the state cannot be considered as a party. EASTERN DIS.
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3. There is no irreparable injury done by these orders. HYDE ET AL.
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4. No copy of the warrant of the governor of this state for the arrest of the defendant, nor of the application of the governor, nor of the process-verbal of the seizure of the property was taken. The plaintiffs' attorney did not require any, and the court did not think it his duty to require such copies *ex officio*, therefore no record can be made in such a manner as may enable the Supreme Court to revise the decisions from which the appeal is asked.

I. On the first cause shown, it does not appear to us that any thing is there alleged which may have any weight with us. The judge seeks to establish the legality of his decision.

If the consciousness of a judge of the correctness of his decision authorised his withholding his fiat when a party expressed his wish to avail himself of his constitutional right to bring it to a test, it would not be vain to pray for an appeal.

The judge a quo cannot withhold an order of appeal on the ground of his consciousness that his decision is correct.

II. The execution of a judgment by the party against whom it is rendered, is indeed an obstacle to his obtaining an appeal from it. But although through his inability to obtain security the judgment may have been executed, he may, if he judges it for his interest to prevent the execution against him from passing *in rem judicatam*, claim an appeal.

Although a party, against whom a judgment has been rendered, is unable to give security to prevent its execution, he may claim an appeal, if he judges it for his interest to prevent the decision against him from passing *in rem judicatam*.

III. In order that an interlocutory judgment may be appealed from, the party must indeed show that it was an irreparable injury; but the irreparability need not be an absolute one. It suffices us to tell such as would be irreparable by the final judgment on the action of this court on that judgment. Here, after the interlocutory order had destroyed the plaintiffs' hold on the body of the debtor, and on the property secured or attached, no judgment of the first court nor of this could replace him on the schedule, he was before the judgment against which he seeks relief, and this

To entitle a party to an appeal from an interlocutory judgment, it is unnecessary that the injury be absolutely irreparable. It suffices if it be such as would be irreparable by the final judgment or the action of the Supreme Court on that judgment.

An interlocutory decree may be appealed from which discharges

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the plaintiff's hold
on the body of
the debtor and on
the property se-
questered or at-
tached.

If an appeal be
claimed within
the legal delay,
the judge *a quo*
cannot refuse to
allow it, because
the judgment was
rendered by his
predecessor, who
had died without
making a state-
ment of facts.

On an applica-
tion for the writ
of *habeas corpus*,
the decision of
the judge upon
matters of a
criminal or poli-
tical nature is
not examinable
in the Supreme
Court.

The writ of
habeas corpus
may be issued in
civil as well as in
criminal and po-
litical cases.

suffices to authorise him to forbear the exercise of his right of appeal till after the final judgment of the cause.

IV. The death of the judge who had rendered a judgment before he may have made a statement of facts, in many instances would prevent an appellant from obtaining one of the legal means of bringing the case before us for examination; still, the judge succeeding to the former, could not, on that account, deny an appeal claimed within the legal time.

None of the causes shown authorises us to withhold the *mandamus*, we have doubted whether the present case be a civil one, and whether there be a proper party contradictorily with or how the reversal of the orders complained of may be sought.

If the attorney general or the person sent by the governor of New York to claim the fugitive, after having obtained the warrant of our executive, had applied for an *habeas corpus* to a competent judge at chambers or in court, on the refusal of the officer having the custody of the body of the fugitive, the matter would perhaps have been of a criminal or political nature, and the decision of the judge on the return of the *habeas corpus*, would not have been examinable in this court, according to the principles laid down in the case of *Laverty vs. Duplessis*, 3 *Martin*, p. 42.

But the writ of *habeas corpus* may be used in civil as well as in criminal and political cases. A tutor deprived of the custody of his ward, or a husband of the company of his wife, may seek a restoration to their rights by a recourse to a writ of *habeas corpus*; so may a debtor, illegally confined in a civil case. If, then, the decision be erroneous, there is nothing of what fell from the court in *Laverty's* case, that will operate against the right of the injured party of having the decision of the first judge reversed on an appeal.

Here the applicant for a *mandamus* shows that he instituted a civil action against his debtor, whose body was arrested and imprisoned for want of bail; that property on which he claimed some right was sequestered and attached; that the officers of the state thought it for its interest that it should

intervene in the suit, demand contradictorily, and make the plaintiff surrender the debtor and property. It called on the plaintiff to declare his reasons for insisting on the detention of both. The District Court has sustained the claim of the state, and deprived the plaintiff of the security he was in possession.

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We are not ready to say that the decision of the court is not a judgment in a civil suit; the plaintiff contends it is, and must have the right of testing his pretensions contradictorily with the party who has obtained a judgment disregarding them.

Let the *mandamus* issue as prayed for.

TESTAMENTARY EXECUTOR OF LEWIS vs. CASENAVE.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF NEW-ORLEANS.

The Court of Probates has jurisdiction over a proceeding instituted to compel the defendant to comply with the terms of a sale, ordered by that court.

The general repealing law of 1823, applies only to the Roman Civil Law, and the Spanish laws in force in the country at the time of the passage of that act, leaving the provisions of our own legislative acts still in force.

An exception in the repealing clause of that act, in favor of a particular chapter of the old *Civil Code*, shows clearly the intention of the legislature to repeal all other parts of it.

The presumption created by the 2568th article of the *Louisiana Code*, regards vices of body solely.

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On motion of testamentary executor of Robert Lewis, it was ordered that J. B. D. Casenave, show cause why a *distringas* should not issue to compel him to comply with the conditions of the sale, made of the slaves of said estate, on the 15th of November last, at public auction, by William Flower, at which sale said Casenave bought a negro man named Archer, for the sum of eight hundred dollars, as appeared by the process verbal of Flower, on file in court.

The defendant in answer to the rule, excepted to the jurisdiction of the Court of Probates, in the matter then submitted to their consideration; and in case the exception should not be sustained, he answered, that he could not be bound to comply with the conditions of the adjudication made to him of a certain slave named Archer, for the following reasons:

1st, That said slave was never delivered to the respondent, and never, up to that time, had been in his possession.

2d, That the said slave had runaway the day of the adjudication, or the very day after, and was sold free from all vices and maladies prescribed by law.

Flower, the auctioneer, testified, that at the sale made by him of the property belonging to this estate, on the 15th of November last, J. B. D. Casenave purchased the slave Archer, for the sum of eight hundred dollars; that the said slave was delivered to him, and he took him away; on the Monday following, deponent met Mr. Casenave, who then informed him that he had given the negro permission the day or two previous, to wit: on Saturday or Sunday, to go and bring his clothes, and that he had not returned; the sale was made on a credit of four months.

Plaintiffs offered in evidence the order authorising the sale, which order is dated the 11th of October, 1832, and the process verbal of William Flower, filed 5th December, 1832, and the order of the court of the same date with the petition, admitting the same to be filed and homologated.

Busquet, testified, that he was in the employ of the defendant in the month of November and December last,

and before that time, he was there on the 15th November; that the slave Archer came to Mr. Casenave, about the 15th November last; that he absented himself the second day afterwards, and has not appeared there since; that he was not illtreated or misused by Mr. Casenave.

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The judge *a quo*, considered, 1st, that the court has jurisdiction of the question, the sale of the slave Archer, having been made by its order and under its authority.

2d, That from the testimony, it appears that J. B. D. Casenave was deprived of the services of the slave Archer, by the said slave Archer running away on the day of the sale, or on the day after; that from the advertisement produced, and under which the said slave was sold, connected with the fact that Archer left Casenave, as aforementioned, it may safely be inferred that Archer was one of those slaves who, in the words of the advertisement, had "*occasionally absented themselves from their late master;*" and that the running away of Archer, within three days after the sale, establishes the presumption that he was in the habit of running away.

The rule was discharged and the adjudication annulled.

The heirs appealed.

Slidell, for the heirs and appellants.

1. The article 74, page 358, of the *Old Code*, which declares that the action does not take place in sales merely on authority of justice, has not been repealed; the repeal cannot be inferred from its omission in the new Code. *Flower vs. Griffith*, 4 N. S. 89. *Pignilit vs. Omet*, 4 N. S. 434.

2. Article 2508, has no application to vices of character; it is evident from the examination of the context, that it only applies to vices of body.

3. The judge erred in refusing a new trial on the affidavit of H. Lewis; the affidavit is admitted to be sufficient, had it been made in time. The new trial was refused, on the ground that it had not been presented within three days.

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This court has decided that it may be made at any time before signing of the judgment. *Smith vs. Harrathy*, 5 N. S. 319.

Soulé, for appellees.

MATHEWS, J., delivered the opinion of the court.

This is a proceeding instituted and now carried on by the executor and heirs of Robert Lewis, to compel the defendant to comply with the terms of sale of a certain slave, sold by order of the Court of Probates, as belonging to the succession of the testator. The sale was made at auction, on a credit of four months. The slave was delivered to the defendant, and two days after being taken home, was permitted by his new master to go to some place for his clothes; he did not return but absconded. An exception to the jurisdiction of the court below, was taken on the part of the defendant, which was overruled. The defence on the merits, is an allegation of the redhibitory vice in the slave of running away; which was sustained by the court of the first instance, and judgment rendered by the defendant, from which the plaintiff appealed.

The Court of Probates has jurisdiction over a proceeding instituted to compel the defendant to comply with the terms of a sale, ordered by that court.

We are of opinion that the exception was properly set aside. The object of the proceeding (originally in a motion for a *distringas*;) is to complete a sale ordered by the Court of Probates, which may well be considered as the tribunal most competent to carry into full effect its own orders. The correctness of the judgment rendered on the merits, is contested on two principal grounds: 1st. That the sale having been made by order of a court, is judicial, and the estate or the representatives of Lewis, are not bound in warranty, &c. 2d. That the record affords no legal evidence of a habit of running away in the slave purchased by the defendant.

As to the first of these grounds, it is assumed in the proposition, that the article 74, page 358, of the *Old Code*, has not been repealed, a doctrine supported by two decisions

to be found in 6 *N. S.* pages 89 and 434. These decisions were made prior to the general repealing law, approved on the 25th of March, 1828. The clause of repeal is sweeping in its effects, *tremendously sweeping*, and an unwise or inconsiderate interpretation on the part of the courts of justice, would have left the community without any civil laws, except those contained in the *Louisiana Code* and *Code of Practice*; an evil so great as to be irreconcilable with the wisdom that must be conceded to our legislatures. Decisions in this court have limited its effects to the Roman Civil Law and the Spanish laws, in force in the country at the time of the repealing act; having the provisions of our own legislative acts still in force, according to general rules of abrogation. But an exception in the repealing clause, in favor of a particular chapter of the *old Civil Code*, shows clearly the intention of the legislature to repeal all other parts of it. It is not pretended that any provision, similar to those found in the *Old Code*, is any where retained in our laws subsequently enacted.

The second ground of defence against the right of redhibition claimed by the defendant, is that on which the decision of the cause mainly rests. The only evidence in support of the position assumed in relation to the redhibitory vice or defect of character in the slave bought, (by the habit of running away) is the presumption established by law arising from the fact of his having runaway within the three days immediately after the purchase, &c. The article 250 of the *Louisiana Code*, is relied on in support of this presumption. To understand this article, reference must be made to some of the general provisions on the subject of redhibition. The vices or defects in slaves which give rise to redhibitory actions, are divided into two classes: such as affect the health of the subject and such as affect his character. Vices of body are distinguished into relative and absolute. Those of body considered absolute, are three, leprosy, madness and epilepsy. The vices of character which give rise to redhibition, are confined to the cases in which it is proved "That the slave has committed a capital offence, or

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The general repealing law of 1828, applies only to the Roman civil law and the Spanish laws in force in the country, at the time of the passage of that act, leaving the provisions of our own legislative acts still in force.

An exception in the repealing clause of that act, in favor of a particular chapter of the *old Civil Code*, shows clearly the intention of the legislature to repeal all other parts of it.

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that he is addicted to theft, or that he is in the habit of running away." It is subsequently provided in the article above cited, "That the buyer who instituted the redhibitory action, must prove that the vice existed before the sale was made to him. If the vice has made its appearance within three days immediately following the sale, it is presumed to have existed before the sale."

On the part of the plaintiffs it is contended, that this presumption created by law, regards solely vices of body; and in our opinion, with great force of reason. As to one of the vices of character, it is wholly inapplicable, viz. the commission of a capital crime. Neither can a habit be proven by proof of a single act; habit is the result of many repetitions of the same act. Effect may be given to the provision of the Code, by limiting it to diseases or vices of body, without making the law institute a forced and unreasonable presumption, and one in some degree contrary to common sense.

The presumption created by the 2506th article of the Louisiana Code, regards vices of body solely.

This question was examined pretty much at large, (if not absolutely decided) in the opinion pronounced in the case of *Zanico vs. Habine*, 5 Mart. 372. According to the doctrine therein indicated, the conclusion may very fairly have been drawn, that the court considered this presumption of law as solely applicable to vices of body. It is true that decision was made under the government of the old Code, but the new and old Code are, touching this matter, similar in their provisions.

It is believed that this rule of evidence was borrowed from the Spanish law on the subject of redhibition, and although these laws are now repealed, we presume it cannot be viewed as a judicial offence, to resort to them in aid of interpretation. We find in the 25th number, under the head of *Redhibitoria*, in the *Curia Philipica*, provisions very similar to those contained in the article 2508 of the *Louisiana Code*; but from the expressions there used, it is evident that the rule in relation to the presumption arising from the appearance of the vice, within three days immediately succeeding the sale, is intended to apply exclusively to vices of body.

It may be well to give the author's own words: "Para haber lugar la redhibitoria, ó *quanto minoris*, ha de sev el vicio, ó defecto en que se funda nacido antes de la venta, y no despues de ella, sino es que fue concebido, y engendrado antes, y despues empezó á pa parecer, que éntonçes tambien ha lugar conforme un texto, y Cepola, el qual, (alegando otros) dice, que en duda si es nacido el vicio incontinentemente, ó tres dias des pñes de la venta, se presume ser habido ántes de ella, &c. *Cur. Phil. Verbo Redhibitoria*, p. 329.

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It appears to us, that it would be in direct opposition to the philosophy of language, to say that a vice or defect made its appearance suddenly, and by one single act or circumstance, when to constitute the vice, habit or a series of acts, are required. The defendant has failed to produce legal proof in support of his exception, as being based on a redhibitory vice.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the Court of Probates be avoided, reversed and annulled; and it is further ordered, that the rule taken on the defendant for a *distringas*, be made absolute, and that appellee pay the costs of this appeal. Reserving to him his right to prosecute his redhibitory action, if any he has.

HOLLAND vs. WHEATON.

APPEAL FROM THE COURT OF PROBATES OF THE PARISH AND CITY OF NEW-ORLEANS.

The applicant for the curatorship of a deceased person, is not entitled to the appointment on the ground that they were both members of the same lodge of Freemasons.

The payment of the tomb of the deceased, makes the person making it a creditor of the estate, not of the deceased, and does not entitle him to the curatorship.

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John H. Holland, on the 6th July, 1833, filed his petition, in which he averred, that Henry Johnson departed this life on the 3d day of July, instant, within the jurisdiction of this court, and leaving property therein; that as *prochein ami* and creditor of said deceased, he was desirous of administering on his estate, according to law.

William H. Wheaton, on the same day, filed his petition, stating, that as *prochein ami*, creditor, and lately partner of said deceased, he was desirous of administering on his estate according to law.

The order of the court upon both applications, was given on the eighth of the month.

Wheaton filed an amended petition, wherein he averred, that Holland had no right to said curatorship, he being no creditor of the deceased, and that the petitioner being a creditor and most intimately acquainted with the affairs of said deceased, was entitled to said curatorship, in preference to Holland.

The amount of the estate, according to the inventory, was two thousand three hundred and thirty-three dollars and forty-one cents.

It was admitted that Holland had paid one hundred and twenty dollars for the tomb of the deceased.

Dissard, testified, that he was the secretary of a certain association which exists in this city, under the denomination of Knights Templars, and under the distinctive appellation of the Indivisible Friends, No. 6; the deceased, Henry Johnson, was one of the members; that John H. Holland is a member, also; that Henry Johnson is indebted to this association, in a sum of about twelve dollars.

Dimond, testified, that while Johnson was sick, he twice told Wheaton to go and speak with him, having understood that Wheaton was displeased at the way Johnson had made his will; he having observed to witness, that had he been present, he had no doubt but that Johnson would have selected him to be his executor; Wheaton declined both times. Deponent, a day or two afterwards, observed to Johnson that Wheaton was displeased at the manner in

which he had made his will, to which Johnson replied, *that Wheaton should never have any thing to do with his affairs.*

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Warbeck, testified, that he had always heard Johnson speak in the highest terms of Mr. Holland as a brother mason, that he can say he viewed him in the light of a brother. Deponent is convinced from all he has heard from Johnson, that he had not sufficient confidence in Wheaton to have appointed him his testamentary executor.

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That in a conversation he had with Wheaton, five or six days before Johnson's death, Wheaton observed to deponent, that he did not believe that Johnson owed a dollar in the world.

Wheaton established a claim, in a sum due to him by the deceased previous to his death, and amounting as follows, to wit: 1st, a sum of seventy-five dollars, due him by the deceased, for his share on an acceptance of the late firm of Wheaton and Johnson, paid by said Wheaton since the dissolution of the said firm, and which sum was, by written agreement between the parties at the time of the dissolution of their partnership, to be reimbursed to Wheaton.

2d, A sum of ninety dollars and sixteen cents, for his share on another acceptance of the said firm, and due to the said Wheaton, as above mentioned; these two sums making in all one hundred and sixty-five dollars and sixteen cents, and besides a sum of fifty-three dollars, amount of a promissory note drawn by the said Henry Johnson, to the order of J. W. Collins, and shown to have been paid by said opponent since the death of said Johnson.

The judge *a quo*, considered that the 1114th article of the *Civil Code*, which recognizes the quality of creditor as establishing a right of preference, applies to the creditors of the deceased previous to his death, and not to such persons as might after the death, become creditors of the succession.

Therefore, the sum paid by the first applicant, John H. Holland, to wit: the sum of one hundred and twenty dollars, for the tomb of the deceased Johnson, as well as the last mentioned sum of fifty-three dollars, paid after the death of said Johnson, by the opponent Wheaton, are not to be

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taken into consideration by the court in the decision of this contest; as to the sum of twelve dollars due by the deceased to the Masonic association of which he was a member, the application grounded thereon, is not sufficiently supported by this claim, it being an unliquidated debt, and the portion accruing thereon to the applicant personally, uncertain.

The application of Wheaton was accordingly sustained. Holland after an unsuccessful attempt to obtain a new trial, appealed.

Elliott and Roselius, for Wheaton, the appellee.

1. There is no benefit to be derived from priority of application in this case, the order of the court on both applications being delivered at the same time.

2. John H. Holland, as a curator of the *succession* of Henry Johnson, cannot be considered in the light that Wheaton the appellee should be, viz. a creditor of the deceased. *Art. 1114, Civil Code.*

Wheaton, is a creditor of Henry Johnson, deceased, in the sum of one hundred and sixty-five dollars and sixteen cents, and must be considered as having superior claims for the curatorship; and, therefore, the judgment should be confirmed.

Preston and Cenas, for Holland, the appellant.

1. The curatorship should be given to Holland, because he applied first. *1116 Code.*

2. Because Wheaton's claims are *fictitious* and to be *contested*. He ought not, therefore, to be appointed curator.

3. The claim hunted up and paid before due, of fifty-three dollars, by Wheaton, does not entitle him to the curatorship, because it is not a credit against the deceased. *1114.*

4. The claims of Wheaton on two bills of exchange, are *fictitious*.

5. No presumption results from possession of drafts, because they must be in possession of one or other.

6. He was in possession of the books and papers of the partnership. EASTERN DIS.
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7. Wheaton told Warbeck, Johnson did not owe a dollar in the world. That he did not mention these pretended partnership claims in his petition, affords a presumption he did not own them.

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8. The buying up the fifty-three dollar note, proves he had not the other claims.

9. Bird misunderstood the conversation between Wheaton and Johnson, for it is entirely inconsistent with the facts disclosed by Wheaton himself and Huntingdon. So far as it proves any thing, it tends to raise presumption of payment by Johnson, of his share, because Johnson was wishing to find the drafts to pay, and if Wheaton had them, they went together to settle; because when both debtor and creditor wish to extinguish the debt and have the means, it is soon done.

MARTIN, J., delivered the opinion of the court.

The plaintiff claimed the curatorship of the estate of H. Johnson, deceased, and is appellant of a judgment, which grants it to his opponent.

He claimed the curatorship, on the ground of his having paid for the deceased's tomb, and on that of the deceased and himself being Freemasons and members of the same encampment of Knight Templars, to which the deceased was debtor about twelve dollars, for certain arrearages; lastly, on the ground of his having been the first applicant.

The appellee grounded his claim on his being a creditor for the amount of a promissory note of the deceased, and one half of the amount of two drafts in a partnership, which had theretofore existed between the deceased and himself, the whole amount having been paid by the latter out of his own private funds.

The appellant's counsel contended, that the curatorship ought to be granted to a creditor of the deceased; that the

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appellee, having purchased the note since the death of the maker, became thereby a creditor of the estate, but not of the deceased; and efforts have been made to disprove the claim urged by the appellee, on the amount of the drafts.

The pretensions of the appellant, on the score of the Masonic tie, which is alleged to have existed between him and the deceased, are hardly deserving of a serious consideration. Whether all Masons, or merely those of the same lodge, are indebted in any case, or in what a first dividend of funds, what is the number of those interested in the present case, are matters which the persons can have but a faint idea of. Neither can we know, whether, before a division can take place, justice may not demand some deduction.

The applicant for the curatorship of a deceased person, is not entitled to it on the ground that they were both members of the same lodge of Freemasons.

If masonry gives no right to the appellant, the payment for the tomb, places him, according to his own argument, among the creditors, not of the deceased, but of the estate, and even on that hypothesis, the appellee may stand on higher grounds, as subrogated to the rights of the payee of the note, who was a creditor of the deceased. We express no opinion on this, as the point is now under consideration, in a case of considerable amount in the Western Circuit.

The payment for the tomb of the deceased, makes the person making it a creditor of the estate, not of the deceased, and does not entitle him to the curatorship.

The change in the sense of the first application, was properly disregarded.

Upon the whole, we do not think the Court of Probates erred.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

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APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
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The Court of Probates has no jurisdiction in an action against an executor for damages occasioned by an act of the defendant not legally done, in relation to the administration of the succession.

Persons interested in an estate, are in equity bound to refund to the vendee the price really received for property sold erroneously, as belonging to the estate, but they are not responsible for consequential damages or loss.

The plaintiff in this case avers that he purchased of J. H. P. Hyde, testamentary executor of William W. McDonough, at New-Orleans, a raft of ash timber, containing one hundred and ninety-nine cords of firewood, sold as belonging to the estate of McDonough, for which raft he paid Hyde the stipulated price; that Mr. McDonough died, leaving a will which has been proved, by which the said Hyde is appointed testamentary executor. That Hyde has received letters testamentary; that subsequently to the purchase aforesaid, one William Zobriskas sued the plaintiff for the said raft or its value, alleging himself to be the proprietor of the same. That the plaintiff cited in warranty the said testamentary executor to defend the title to said raft, who did accordingly appear and plead to the demand of Zobriskas upon the issue thus joined. Judgment was rendered by the District Court for the first district in favor of Zobriskas, according to the prayer of his petition, with costs, against the plaintiff in this suit; by means whereof the plaintiff had been deprived of the possession and property of said raft, so purchased from Hyde. That the plaintiff is a dealer in firewood, and that the said raft, cut and corded, was justly worth to him, after deducting the expense of cutting and cording the same, the sum of six hundred ninety-three

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dollars and forty-four cents, which sum, the estate of McDonough is bound to pay him; and being so liable, the said testamentary executor refuses to pay, though amicably demanded. That the said estate is bound to repay him the further sum of two hundred dollars, being the costs in the suit of *Zobriska vs. Hurst*, above referred to.

The defendant denied that the estate of McDonough is indebted to the plaintiff in the sum claimed, or any other sum. He says that the raft alluded to did not belong to the deceased, of which fact plaintiff was aware at the time of his purchase; this respondent having sold the raft in the petition mentioned, in good faith, believing the same to belong to the said deceased; but the plaintiff at the time he purchased said raft, knew the fact of its belonging to another person, and purposely concealed it.

Zobriska testified, that he was the proprietor of a raft of timber, sold by Mr. Hyde to the plaintiff. It produced two hundred and twenty-eight cords of wood, damaged and all, and contained one hundred and thirty-three tier or trees. Ash wood, at the time he sold that in question, was worth from four dollars and twenty-five to four dollars and fifty cents per cord, wholesale. One dollar and twelve cents per cord is the price generally paid for cutting and splitting ash wood. The raft is the same that he sued Mr. Hurst for in the District Court, and recovered; as far as deponent is concerned, Mr. Hurst has satisfied the judgment rendered against him.

Charbonnet, deputy sheriff of the parish of Jefferson, testified that he seized a raft of timber in obedience to an order from the District Court aforesaid, in the suit of *Zobriska vs. Hurst*; that at the time deponent seized the raft in question, a conversation took place between Mr. Hurst and Mr. *Zobriska*, in which the latter stated that the raft belonged to him. Mr. Hurst replied that he had no doubt but that it did, but that he, Mr. Hurst, had purchased the raft from the estate of McDonough, and the receipt for the same.

The judge *a quo* considered: 1. That the plaintiff has sus-

tained his claim by the evidence of this case, and that introduced on the trial of the case of *Zobriskas vs. the plaintiff*, in the District Court; that this claim for the raft sold to him by the defendant, and which, after having paid for it, he was obliged to surrender, is properly stated in the bill annexed to his petition, to wit: at six hundred twenty-three dollars and forty-four cents. 2. That the costs proved to have been paid by the plaintiff, in consequence of the suit of *Zobriskas* against him, amount to one hundred eighty-three dollars and sixteen cents, which he is also entitled to claim from the present defendant, making together a sum of eight hundred and six dollars.

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Judgment was rendered accordingly for the sum of eight hundred six dollars and sixty cents.

The defendant appealed.

MATHEWS, J., delivered the opinion of the court.

In this case the plaintiff claims damages from the estate of the deceased in consequence of the loss of a raft of ash logs, which was sold to him by Hyde, in the capacity of curator, and which was afterwards recovered from the purchaser at the suit of one *Zobriskas*, as having the best right to the property. The judgment rendered against the defendant in the court below, is for the sum of eight hundred six dollars and sixty cents. From this he appealed.

This is, in truth, a judgment against the estate of the testator, or the Court of Probates is wholly without jurisdiction; and if a plea to the jurisdiction of that court had been made, it ought to have been sustained, considering the suit as one for damages occasioned by an act of the defendant not legally done in relation to the administration of McDonough's succession.

The Court of Probates has no jurisdiction in an action against an executor for damages occasioned by an act of the defendant not legally done in relation to the administration of the succession.

The persons interested in that estate, are in equity bound to refund to the plaintiff the price really received for the property which appears to have been erroneously sold as belonging to it, but are not responsible for consequential damages or loss. The defendant ought, perhaps, to have

The persons interested in an estate, are in equity bound to refund to the vendee the

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price really received for property sold erroneously as belonging to the estate, but they are not responsible for consequential damages or loss.

pleaded to the jurisdiction of the Court of Probates, although it would certainly have been an act of extreme honesty, as such a plea is only supportable on the ground of his personal liability.

As the case now stands before this court, we are unable to discover any way in which justice may be done between the parties, except by reversing the judgment of the Court of Probates, giving judgment against the defendant in his capacity of curator, to be paid out of the estate of the deceased, to the amount of the price actually received for the wood in question, and leaving to the plaintiff the right to pursue Hyde in his individual capacity, in any court of ordinary and competent jurisdiction, for the recovery of such damages as are only consequential on the unadvised act of the defendant.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be avoided, reversed and annulled. And it is further ordered, adjudged and decreed, that the plaintiff and appellee do recover from the defendant and appellant the sum of three hundred and eighty-two dollars, to be paid by him as executor out of McDonough's succession, with costs in the court below, and those of the appeal to be borne by the appellee; reserving to him his right to pursue the defendant in his individual capacity to recover damages, such as may have been sustained by the conduct of said defendant.

Buchanan, for plaintiff and appellee.

Carleton and Lockett, contra.

GASQUET ET AL. vs. DIMITRY.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

Subsequent mortgagees can successfully make many objections to the extinguishment of their mortgages, or the release of them by the sheriff, when a sale at the instance of the first mortgagee leaves nothing for them.

A prior mortgagee who requires the court to order the sheriff to release the subsequent mortgages, cannot be heard, unless he has made them parties, or given them notice.

The plaintiffs obtained an order of seizure against the defendant, on a mortgage. The parties agreed that the property should be sold at six and twelve months credit, and the notes discounted at a rate not exceeding twelve per cent. There were several mortgages posterior to that of plaintiffs. The property was sold, and the sheriff has made a return on the execution, by which it appears that the property did not bring more than sufficient, to satisfy the first mortgage. The sheriff is called upon by rule, to release the subsequent mortgages in favor of the purchaser. The sheriff submits himself and prays the direction of the court. Among the mortgagees is that of defendant's wife, who has obtained a judgment of separation of property.

The rule was dismissed and the plaintiffs appealed.

Schmidt, for plaintiffs and appellants.

1. The sheriff was bound to release the subsequent mortgages. *Code of Practice*, art. 708.

2. The subsequent mortgagee creditors can have no interest in contesting the plaintiffs' right, as it appears that his debt bears interest, at the rate of ten per cent., and it is in evidence, that it absorbs the whole amount for which the property was sold.

Canon, contra.

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MARTIN, J., delivered the opinion of the court.

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The plaintiffs are appellants from the discharge of a rule which they had obtained on the sheriff of the parish of New-Orleans, to show cause why he did not release the subsequent mortgages on a tract of land, sold on a writ of seizure and sale, at the instance of the first mortgage whose claimer had exhausted the net proceeds of the sale. *Code of Practice*, 708.

The sheriff averred his readiness to do whatever, the court would direct, but thought himself entitled to the opinion of the court, in the premises, under the *Code of Practice*, 629.

The record shows that the sale had been made with the consent of the creditor and debtor, at six and twelve months, who agreed that the purchasers notes should be discounted at a rate not exceeding twelve per cent. a year.

The questions which this case presents, are of very great importance, and we have to lament that the parties thought differently, since no counsel appeared to argue them, either in the first court or in this.

Many are the objections which subsequent mortgagees can successfully make to the extinguishment of their mortgages, or the release of them by the sheriff, when a sale at the instance of the first mortgagee, leaves nothing for them.

Subsequent mortgagees can successfully make many objections to the extinguishment of their mortgages, or the release of them by the sheriff, when a sale at the instance of the first mortgagee leaves nothing for them.

In the present case the subsequent mortgagees may think they may resist this extinguishment or release, on the score of the terms of sale agreed on between the first mortgagee and the common debtor, as binding on these two individuals alone. The sheriff has thought it his duty to himself, and the subsequent mortgagees, to refrain from acting till he had the counsel of the court.

Our duty now is not to say, whether he erred, but whether the district judge did so.

Although these mortgagees are not parties to the rule, its being made absolute may do them great injury. They may not be bound by it, but the sheriff may release, and the recorder of mortgages, on the production of the release,

may proceed to the radiation of these mortgages, and the radiation may occasion trouble and injury to these mortgagees, and subsequent purchasers.

The first duty of a judge is to hear a party, before he makes a decision to his injury.

Applying this proposition to the present case, we cannot say the first judge erred, when he concluded that the person who required him to order the sheriff to release the mortgages, could not be heard, because he had not made these mortgage parties or given them notice.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed with costs.

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vs.

FAURIE ET AL.

A prior mortgagee who requires the court to order the sheriff to release the subsequent mortgages, cannot be heard, unless he has made them parties, or given notice.

GLEISES vs. FAURIE ET AL.

APPEAL FROM THE FIRST JUDICIAL DISTRICT.

Payment is a peremptory exception going to extinguish the action, and must be pleaded.

The petition alleges that Charles Faurie is indebted to John Gleises in the sum of five hundred and sixty-one dollars and seventy-three cents, for the rent of the premises lately occupied by Marignau & Faurie, as Blacksmiths and founders, in suburb Marigny, for fifteen months, which expired on the 30th June, 1831, at the rate of thirty-six dollars and sixty-six cents per month, and eleven dollars and seventy-three cents interest thereon; that by an act passed before Louis T. Caire, notary public, Faurie took upon himself and promised to pay all the outstanding debts due by said firm of Marignau & Faurie out of such monies as he might collect due to

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the said firm; with which collections he was charged by said act and bound to make. That for the faithful performance of the stipulations set forth in said act on the part of said Faurie, Alexander Baron bound himself *in solido* with said Faurie; that the sum now claimed is a debt due by said firm, and that said Faurie & Baron are bound jointly and severally to pay the same.

Baron excepted that the petition exhibited no cause of action against him.

He answered, in case the exception should be overruled by denying all matters and facts contained in the petition. He denied that he entered into any contract with the plaintiff, or into any obligation in his favor. He contended that the suretyship mentioned in the notarial act annexed to the petition, was granted by him for the exclusive use and benefit of Jean Marignau, by whom he has since been released and exonerated from the same by another act executed before the same notary, Louis T. Caire, on the 24th of August last.

Faurie denied all matters of fact set forth in the petition, and he specially denied that his late partnership with Jean Marignau was joint and several, or that the same was in any way indebted to the petitioner in the manner and form as set forth in his petition. He averred that the petitioner was indebted to the said late partnership in the sum of twenty dollars and seventy-five cents.

On the trial, the following bills of exception was taken. The defendants offered in evidence a certain paper, passed before Louis T. Caire, between Faurie, Marignau and Baron, purporting to be a dissolution of their partnership and discharge of said Baron. To this the plaintiff objected, on the ground that he was no party to said act, that it was not pleaded, and the same was irrelevant and illegal evidence in the case of *Gleises vs. Faurie*.

The defendants then offered certain other documents. The counsel for the plaintiff objected also to said documents, on the ground that they were not embraced by the plead-

ings, and were not legally admissible as evidence in this case. EASTERN DIS.
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The defendant had judgment and the plaintiff appealed.

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Carleton and Lockett, for plaintiff and appellant, contended that:

1. The judge of the court below erred in admitting evidence to show a payment, when the same was not pleaded.
2. The evidence on record shows that the plaintiff demanded payment of the debt sued for from Laurie, *who promised to pay it*.
3. The judge of the District Court erred in deciding that the plaintiff had no right of action against Baron.

D. Seghers, contra.

BULLARD, J., delivered the opinion of the court.

In this case the appellant relies for a reversal of the judgment principally on a bill of exceptions to the admission of a document marked G. in the record, of a case of *Maignan vs. Gleises*, to prove payment of the debt sued on. The defendant's plea was a general denial, and a small offset; and the question is, whether evidence of payment may be given without being pleaded.

Payment is a peremptory exception, going to extinguish the action, and must be pleaded.

We are of opinion that payment is a peremptory exception, going to extinguish the action, and which the *Code of Practice* requires to be pleaded. It is true that in the action of assumpsit at common law, it is generally understood that payment may be given in evidence under the plea of the general issue. But the assumpsit or promise in that form of action, is a position implied by law, from a state of indebtedness, and any kind of evidence which goes to prove that the defendant in fact owed nothing at the time of the implied promise, is admissible under the plea of non-assumpsit. But our law does not proceed on such subtleties, nor is it believed

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that such evidence would be admissible under the plea of the general issue in other forms of action at common law.

Our *Code of Practice* has adopted the classification of exceptions from the Spanish law in force before its promulgation, except so far as they had been modified by statute. Febrero classes payment under the various names of *Solucion*, *paga*, and *finiquito*, with the exceptions either purely peremptory or partaking of the nature of dilatory and peremptory, and after enumerating several of both kinds, he adds "*y todo las que acreditan que el demandante procede sin accion por no competirle o no tenerla ya aunque la hubiere tenido.*" 3 Febrero Novlsim, p. 323-4.

We think the court erred in admitting the document. In relation to the defendant Baron, we concur in opinion with the first judge, that the plaintiff has no action against him. He was surety for the defendant Faurie, as liquidator of the partnership of Maignan & Faurie, that the latter should collect the monies due to the partnership, and pay the outstanding debts. Even admitting this to be a stipulation which the plaintiff would have had a right to accept, yet it appears that before this suit was instituted, Baron had been released from all liability as security.

The evidence in the record is not such as to enable us to do justice to the parties, without remanding the case.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, so far as it relates to the defendant Faurie, be annulled and reversed, that the case be remanded for a new trial, with directions to the judge not to admit in evidence the document G. under the present state of the pleadings, and that the defendant Faurie pay the costs of the appeal.

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TOURNE vs. HIS CREDITORS.

TOURNE
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CREDITORS.

APPEAL FROM THE COURT OF THE FIRST DISTRICT.

The wife cannot oppose the homologation of the proceedings of her husband as an insolvent debtor, unless she is authorised by him, or by the judge on his refusal.

The wife cannot vote in the deliberations of creditors, unless her rights have been settled by partition or a judgment.

The wife has no action against the husband for property of the community sold by him, before the institution of a suit for separation.

Jacques Tourné on the 14th May, 1833, averring his insolvency had been occasioned by discords in his family, ceded his property to his creditors.

His bilan showed his wife to be a creditor by her dotal rights for three hundred and twenty dollars. It attributed the insolvent's loss of two thousand dollars to his wife's prodigality. The active debts amounted to seven thousand three hundred and seventy-seven dollars, and the passive debts to nine thousand three hundred and eighty-four dollars and seventy-seven cents.

At the meeting of the creditors all appeared excepting one, who was a creditor for four hundred and sixty-six dollars. All but the wife accepted the cession, and voted for the insolvent as his own syndic. She declared herself his creditor for the three hundred and twenty dollars, for her dotal rights, and for four hundred dollars decreed to her as alimony by the Parish Court. She refused to accept the cession, and to discharge the insolvent. She averred that she was his lawful wife, and that by a clause in their marriage contract, there was a partnership of acquets and gains between them pending their marriage.

She also alleged, that her husband had, on the 21st day of December, 1832, after he had been informed of her inten-

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tion to sue him in the Parish Court, for a separation of bed and board, in consequence of his bad treatment of her, sold all his real estate by public act to Pascal Mathiew and Joseph Etienne Tourné, his sons, with the intention to deprive her of her rights in the property acquired during the marriage. She alleged fraud and collusion in this sale, as to all concerned in it; that the same was simulated and made in order to ruin her; that the purchase money had not been paid as stipulated.

She opposed the appointment of her husband as syndic, for the above mentioned causes; and, also, because from the said acts of sale and the bilan, it appeared that he had attempted to defraud his creditors, by concealing the cash paid and notes given for his property, at the sale to his said sons.

She opposed the claims of several creditors of the insolvent, as placed on the bilan; denied the prodigality, and alleged that she was a creditor for two thousand dollars, the value of half the property which he had pretended to sell to his sons. Or if the sales were lawful, she claimed half [the consideration thereof, as belonging to her. She voted for another person as syndic.

She, also, opposed the homologation of the proceedings before the notary, on the grounds already stated. She produced notarial copies of the sale and marriage contract referred to.

The marriage contract, dated, "6 Brumaire, an 6," was passed before the notary public of the "*Commune d'Astafort au Department de Lot et Garonne*," and there enregistered. It contained a clause in the following words: "*S'associent les future epoux en tous les acquêts qu'ils feront pendant leur mariage desquels chacun feira à sa volente.*"

The act of sale stated that the lands sold were burthened with a general mortgage of Mrs. Tourné, resulting from the marriage contract, which contract was, on the 21st August, 1832, enregistered in the office of the recorder of mortgages, in the city of New-Orleans. The insolvent bound himself to guarantee to the purchasers, the title as to this mortgage.

The insolvent and several of the creditors, excepted to the vote and opposition of Mrs. Tourné, on the following grounds:

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1. That she had neither been authorised by her husband or the judge.

2. That her pretended rights had never been settled by a deed of partition, or by a separation of goods.

3. That the husband has sold none of the community property, since the suit for a separation was instituted; and as to the sale previously made, the wife's only remedy was against the heirs of the insolvent, after his death.

The judge *a quo*, dismissed the opposition and ordered the proceedings before the notary to be homologated. Madam Tourné appealed.

Canon, for the appellant.

D. Seghers, for the insolvent.

1. In all the deliberations which shall take place between the creditors, the wife, in partnership of goods with her husband, shall not be allowed to vote in said deliberations, unless her rights should have been previously settled by a deed of partition, or a judgment for a separation of goods. *Insolvent Act of 1817, sec. 15, p. 132.*

2. The wife cannot appear in court without the authority of the husband, or of the judge. *Louisiana Code, articles 123 and 126.*

3. With regard to the community, property sold by the husband, *previous* to the wife's demand of separation from bed and board, she has no right of action against him on that score during his lifetime, but only against the heirs after his death, if she should prove that he has sold the same, or otherwise disposed of it, to injure her.

4. Taking, however, for argument's sake, that the vote of the appellant amounted to something, to what did it amount? To any fanciful sum she chose to allege? Certainly not. The sum declared in the bilan was the only guide, as to her,

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for the other creditors, unless she should have rested her claim on proper documents and not on her own fancy. This, too, was the light in which she viewed her own case, for had she out-voted the other creditors, what would have been the use for her opposition? Besides, she having filed the same, the other creditors came in by way of exception, to which mode of proceeding the limitation provided by the 18th section of the act of 1817, does by no means apply, it being intended only for the opposition.

Schmidt, for the creditors.

MARTIN, J., delivered the opinion of the court.

The insolvent's wife complains of a decision which dismisses her opposition to the homologation of the proceedings before the notary, on the following grounds:

1. The insolvent had been illegally appointed syndic of his own creditors, as he had attempted to defraud them by the sale of his property, and the concealment of the money and notes he had received for it from his sons, the vendors.

2. Several individuals were illegally put on the bilan as creditors, and voted as such.

3. She is a creditor to so considerable an amount, that her vote, if it had been received, would have prevented her husband's appointment as syndic.

Her opposition was resisted, because,

1. She was not authorised by her husband, or the judge.

2. Her claim, if she had any, was not ascertained by a partition on a judgment of separation of property.

3. That the husband had sold no part of the property of the community, since the institution of her suit for a separation of property, and if he had, her only remedy was against his heirs after his death.

The wife cannot oppose the homologation of the proceedings of her husband as an insolvent debtor, unless she is authorised by him, or by the judge, on his refusal.

It appears to us, the District Court did not err.

The opponent could not appear in a court without being authorised by her husband, or the judge, on his refusal. *Code of Louisiana*, 123, 126.

The wife cannot vote in the deliberations of creditors, unless her rights have been settled by partition or a judgment. *2 Moreau's Digest*, 426. *Acts of 1817*, section 15, page 132.

The wife has no action against the husband on the score of property of the community, sold by him before the institution of a suit for separation. *Code of Louisiana*, 148, 2373.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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The wife cannot vote in the deliberations of creditors, unless her rights have been settled by partition or a judgment.

The wife has no action against her husband for property of the community sold by him before the institution of a suit for separation.

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APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

Marriage is regarded in no other light than a civil contract highly favored.

The *Louisiana Code* does not declare null a marriage not preceded by a license, and not evidenced by an act signed by a certain number of witnesses and the parties; nor does it make such an act exclusive evidence of a marriage. These laws relating to forms and ceremonies, are directory to those alone who are authorised to celebrate marriages.

Marriage may be proved by any species of evidence not prohibited by law, which does not presuppose a higher species of evidence in the power of the party. Cohabitation as man and wife furnishes presumptive evidence of a preceding marriage.

A bill of exceptions to the rejection of depositions which are not before the Supreme Court, not specifying the grounds upon which they were rejected, is too vague to be examined in this court.

This action was brought to recover one thousand dollars damages for an alleged breach of a contract of passage.

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The plaintiff avered that on the 15th day of November, 1832, Eliza Holmes, his wife, being then in Liverpool, engaged passage to New-Orleans on board the ship *Princess*, commanded by George W. Holmes, for herself and child. She engaged a cabin passage, but agreed to sleep in a state room in the steerage, and find her own bedding, for one hundred dollars, the state rooms in the cabin being all taken up. Having made this arrangement, the wife of the plaintiff conducted herself with perfect propriety during the voyage.

That Holmes, without any just cause, prohibited her from eating with the cabin passengers, and ordered her to eat with the servants in the lower cabin, and subsequently ordered her not to come into the cabin at all, but to remain and eat in the steerage, and to pass up and down the hatchway appropriated for the steerage passengers. In the course of the voyage, he refused to furnish her sufficient nourishment, or at the necessary intervals, for herself and child; that he refused her the light necessary to take proper care of her child, or a chair in her state room; and, in the course of the voyage, without any cause, threatened to put her in irons.

The defendant excepted that not being acquainted with the plaintiff, he had no knowledge of the fact of his being the husband of Eliza Holmes; he denied the same, and required proof thereof, before he should be required to answer to the plaintiff's petition on the merits. He also excepted that if the plaintiff be the husband of Eliza Holmes, he cannot, in his own name, institute and prosecute a suit for the matters and things charged in his petition.

The judge *a quo* considering the first exception as going to the merits, and the second as unsustainable by the 10th article of the *Code of Practice*, dismissed them, and ordered the defendant to answer on the merits.

He denied all and singular the allegations in the petition contained, excepting so far as specially admitted. He said that Eliza Holmes, with her child, embarked at Liverpool on board of the ship *Princess*, commanded by him, but he

denies that he has in any manner violated the contract made by him with said Eliza Holmes; he says that any charge made in the manner of accommodating the said Eliza Holmes on board the aforesaid ship was called for and justified by her improper behaviour. Being ignorant whether said Eliza Holmes be married as alleged by the plaintiff, he requires strict proof of said marriage, which he denies to exist.

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Elizabeth Smith, testified that she came passenger on board the ship *Princess*, from Liverpool, in November, 1832; Mrs. Holmes came passenger on board said vessel. In the first part of the voyage, Mrs. Holmes eat in the cabin, with her child, but was afterwards exchanged from the cabin; she was ordered into the steerage, and was furnished with the fragments left by the cabin passengers, for her meals.

J. C. Woods, testified that he was present when Mr. Holmes offered to pay the passage of his wife from Liverpool to New-Orleans, provided the captain would give him a receipt stating that he had agreed that his wife should come out in the cabin; to which the captain answered that he would state that she had come in the steerage, and would deduct twenty-five dollars, which Mr. Holmes refused.

The plaintiff offered a witness to prove that the plaintiff and Mrs. Holmes, who were then in court, had lived in New-Orleans a length of time, and had a family, and were reputed husband and wife. The testimony was objected to, as illegal, and after argument, rejected. The plaintiff excepted.

The plaintiff took another bill of exceptions, in the following words: On the trial of the cause, the plaintiff offered in evidence the depositions on file, taken by Gallen Preval, Esq., associate judge of the city court, and his own affidavit on file, marked A, they were objected to as evidence, and after argument, rejected by the court; to which opinion of the court the plaintiff excepted.

It was admitted that no affidavit was filed on taking out the commissions, as required by article 430, *Code of Practice*; nor was there any consent by the defendant to waive that

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formality. That no personal service was made of the time and place of taking the testimony, either on the party or his counsel, but was served on the steward of the ship of which the defendant was captain; and the return does not state his age, nor that he was a free man, but states, however, that the steward said the captain was asleep on board. That one notice was served at half past two o'clock, P. M., to take testimony, and another at four o'clock of the same afternoon; that the other notice was served on one day to take testimony, and also on the next day at half past eight o'clock in the morning.

The court below rendered a judgment of non-suit, from which the plaintiff appealed.

Preston, for the plaintiff and appellant, contended as follows:

1. The object of an affidavit is to induce the court to grant the commission. If the court grants it without an affidavit, that does not vitiate the commission. The commission is the authority of the court to take testimony to be read in evidence, in case the witnesses are absent. The court might refuse that authority, until satisfied by an affidavit of the necessity of granting it; but when satisfied without an affidavit, may grant the authority, which is not on that account void. It is apparent that the case exists which it would have made appear. Besides, it appears to us that article 430 of the *Code of Practice*, was intended to apply only to the taking of testimony before issue joined, which might put a party to some risk and inconvenience from want of preparation; but after issue joined, every facility should be given to the taking of testimony.

2. The notice given as to one of the commissioners, was manifestly sufficient.

3. The plaintiff was present in court with his wife prosecuting this suit, and yet the court required proof that she was his wife. This was unreasonable.

4. The plaintiff, however, offered to prove by his neighbours, that he had always lived and cohabited with his wife as such; that they were rearing a family as legitimate children. This was rejected. It has been unanimously admitted by courts as evidence of marriage. *Starkie on Evidence*, p. 937, and following. The case of *Taylor vs. Scott*, 3 *La. Reports*, p. 35, and the other cases cited by the defendant's counsel, prove the same thing.

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T. *Slidell*, for the defendant and appellee, made the following points:

1. The Parish Court properly rejected evidence of cohabitation and long living together, to establish the fact of the plaintiff's marriage. If it be not shown that the marriage was contracted out of this state, it will be presumed to have been contracted here. If even it had been shown to have been contracted out of the state, yet, if the laws of the country in which the parties contracted is not set forth, the court must take that of this state as their rule. *Campbell vs. Miller*, 3 *N. S.*, 149. *Saul vs. his creditors*, 5 *N. S.*, 616. The *Civil Code*, art. 107, directs the mode of celebrating a marriage. "The marriage must be celebrated in the presence of three witnesses of full age, and an act must be made of the celebration, signed by the person who celebrates the marriage, also by the parties and the witnesses." It is a settled rule of evidence, that the best testimony must be produced of which the case is susceptible. The fact of marriage should be proved by the act or certificate contemplated in article 107 of the *Civil Code*, nor should inferior evidence be allowed, unless it were proved that this act had been lost or destroyed. The marriage license should also be produced, since without it, the person celebrating the marriage was not authorised so to do. "Article 103. No marriage can be celebrated without the special license of the parish judge, directed to the priest, minister, or justice of the peace, who is to celebrate it. In the case of *Taylor vs.*

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Levell, the introduction of parol proof of a marriage, was allowed on the ground that the marriage was shown to have been contracted in South Carolina, and on proof of the laws and customs of that state in relation to the proof of marriage, and of the legal presumptions there adopted by the principal courts of justice, arising from cohabitation in support of the existence of marriage, when no evidence could be adduced of its celebration. 3 *La. Reports*, 33. In the case of *White vs. Holsten*, parol evidence of the marriage was admitted on the same ground, viz: that parol evidence of the fact or of circumstances from which it could be presumed, was allowed by the laws of North Carolina, where it took place. 4 *Martin*, 671. In the case of *Wyche vs. Wyche*, 10 *Martin*, 414, the cohabitation of the parties was allowed to be proved, but then the marriage was contracted out of the state, and a marriage contract was also given in evidence. A distinction was attempted to be made between cases where the marriage was the gist of the action and cases where it was only subsidiary to it. It is difficult to conceive upon what grounds the fact of marriage in this case can be disconnected with the very substance of the action; for if the plaintiff be not the husband of Mrs. Holmes, who is alleged to have been maltreated by the defendant, and whose violated rights are the ground of the damages laid in the petition, he certainly is at once stripped of all authority to bring this suit. It is the fact of being her husband, which, by the article 107 of the *Code of Practice*, invests him with authority to bring this suit; the marriage is substantially the source of his right to sue defendant. It has been explicitly directed in the answer. It must therefore be established, and that too, as has been shown by the highest evidence which the case will allow, that is to say, by the act or certificate of the priest or other person, who celebrated it.

2. The court cannot notice the objection or exception of the plaintiff's counsel with regard to certain testimony taken under commission, inasmuch as the record contains neither the testimony alluded to, nor the return of the officer who served the notices on the defendant, nor indeed any thing

in relation thereto but the plaintiff's exception to the judge's opinion and a note of the clerk that the depositions have been returned but not filed. Where the court are not supplied with the proper means and data of making up their opinion, they will dismiss an appeal. *Somepeyrac vs. Cable*, 12 *Martin*, 431; *Wiltz vs. Dufau*, 10 *Martin*, 21; and many other similar cases.

3. In case of giving consent to have the commissions brought up and submitted to the court, I make the following points: 1st., That no affidavit was filed previous to taking out the commission, as required by article 430, of the *Code of Practice*. 2nd., That reasonable time was not given on service of notice to enable the party to attend, as required by article 436 of the *Code of Practice*. 3d., That in case of one of the examinations the notice was not duly served, having not been served on the party nor his advocate, but on the steward of the ship, and the return does not state the age or freedom of the steward. Moreover, the Code directs that the notice should be given to the party or his advocate, and does not seem to imply any other than a personal service. *Code of Practice*, arts. 199, 430.

BULLARD, J., delivered the opinion of the court.

The plaintiff alleges that his wife and child came as passengers from Liverpool to New-Orleans in a vessel of which the defendant was master; that she engaged a cabin passage, but agreed to sleep in a state-room in the steerage, the state-rooms in the cabin being taken up. He claims damages for a violation of the contract, alleging that his wife was driven out of the cabin, compelled to eat with the servants, and in other respects ill treated on her passage.

The defendant admits that "one Eliza Holmes, with her child," did come out passengers in the ship, but he alleges that he did not violate his contract, and that any change in her accommodations on board was justified by her improper behaviour. He adds, that being ignorant whether said Eliza be married as is alleged by the plaintiff, he requires

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strict proof of the marriage, which he denies to exist. On the trial, the plaintiff offered witnesses to prove that the plaintiff and Mrs. Holmes, who were then in court, had lived in New-Orleans a length of time and had a family, and were reputed husband and wife. This evidence was rejected by the court, a bill of exceptions taken, and a judgment of non-suit being rendered, the plaintiff appealed.

It is contended on the part of the appellee, that as the Code requires marriages to be celebrated in the presence of three witnesses, and an act to be drawn up and signed by the parties, the witnesses, and the person performing the ceremony, parole evidence is inadmissible to prove a marriage in this state.

Marriage is regarded in no other light than a civil contract, highly favored.

The Louisiana Code does not declare null a marriage not preceded by a license, and not evidenced by an act signed by a certain number of witnesses and the parties, nor does it make such an act exclusive evidence of a marriage. These laws relating to forms and ceremonies, are directory to those alone who are authorised to celebrate marriages.

Marriage may be proved by any species of evidence not prohibited by law, which does not presuppose a higher species of evidence in the power of the party. Cohabitation as man and wife, furnishes presumptive evidence of a preceding marriage.

Marriage is regarded by our law in no other light than as civil contract, highly favored, and depending essentially on the free consent of the parties capable by law of contracting. Our code does not declare null a marriage not preceded by a license, and not evidenced by an act signed by a certain number of witnesses and the parties; nor does it make such an act exclusive evidence of a marriage. These laws relating to forms and ceremonies, here regarded as directory to those alone who are authorised to celebrate marriages, are intended to guard against hasty and inconsiderate marriages in defiance of parental authority. Like all other contracts, it may be proved by any species of evidence not prohibited by law, which does not presuppose a higher species of evidence within the power of the party; and cohabitation as man and wife, furnishes presumptive, evidence of a preceding marriage. It is not to be presumed those who hold themselves out in society as man and wife, who are rearing a family of children at their domestic board, to whom the father gives his name, over whom he exercises a parent's authority, and administers a parent's protection and support, are living in open disregard of public morals, and that their common offspring are bastards; such a family is already in the possession of a civil condition or *status*, not to be questioned lightly and collaterally. In the present case, the defendant, when he received on board

his ship Mrs. Holmes and child, must have presumed that she was a married woman or a widow. When he afterwards treated with the plaintiff about the price of their passage, he dealt with him as the husband and father; no question was then made of his authority.

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If a different rule of evidence prevails in France, it is because the Code as well as previous ordinances provided for public registries of marriages, births and deaths, under the care of special officers, called "*officiers de l'Etat civil*." Extracts from these registers are declared to be full evidence until proved to be forged; and second, any evidence is inadmissible without first proving that no such register was kept, or that it has been lost or destroyed. *Merlin's Repertoire. Verbo Etat Civil*. Our law has not enacted such a registry of marriages. We think the court erred in rejecting the evidence offered.

The second bill of exceptions is too vague to enable us to decide whether the depositions ought to have been admitted. It does not appear on what ground they were rejected by the court, nor are the depositions themselves before us.

A bill of exceptions to the rejection of depositions which are not before the Supreme Court, and not specifying the grounds on which they were rejected, is too vague to be examined in this court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be avoided, reversed and annulled, and that the cause be reinstated and remanded for trial, with directions to the judge not to reject the evidence offered to show the cohabitation of the plaintiff with Mrs. Holmes as man and wife, and that the defendant and appellee pay the costs of appeal.

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HOOKE ET AL. APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

In the term *curator ad hoc*, the word *negotium* is understood; as the word *litem* would be if the term *curator ad hoc* were used.

Owners of undivided parts of an estate, have at all times the right of requiring a partition; and no exception exists with regard to minors.

Proceedings in suits of partition are now conducted according to the rules prescribed by the *Code of Practice* and the *acts of the legislature*, since the great repealing act of 1828.

This case came on to be heard on the second appeal. For a statement of the facts of the case and the judgment of the Supreme Court, reversing that of the Court of Probates, on a plea to its jurisdiction, remanding the cause for further proceedings, *see ante*, 420.

After the case was remanded it was tried on its merits, and a judgment of the inferior court rendered in favor of the plaintiff, and referring the parties to Felix Grima, Esq., a notary public in the city of New-Orleans, to continue the proceedings of the partition.

From this judgment the *curator ad hoc* appealed.

I. W. Smith, for the plaintiff and appellee, contended that:

1. The terms *curator ad hoc* and *curator ad litem* are used as synonymous in our Codes. By the rules of etymology, they refer to the same thing. But if this view be erroneous, the term employed in this action, to wit, *curator ad hoc*, is that which is found in the *Code of Practice*. *Code of Practice*, 116, 924.

2. The necessity for a family meeting is not made apparent in the proceedings which have taken place in this action. The right to a partition being given by the *Louis-*

ana Code in all cases, it is not to be impaired by a want of the useless formality of a family meeting, to deliberate on that which the law has previously decided.

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3. The rules in relation to family meetings in cases like the present, are found only in the *Louisiana Code*. This Code *quoad* its rules of proceeding not found in the *Code of Practice*, was abrogated by the repealing act of 1828. The rules as to family meetings, are rules of proceeding in the action for a partition; the *Code of Practice* has no provision applicable to the case, and the Supreme Court will not, by a latitude in construing legislative enactments, increase the existing difficulties in the way of disposing of the property of minors. *Acts of 1828, p. 160, sec. 25. Code of Practice, 964. 2. Martin, N. S., 79, Agaisse et al. vs. Guerdon.*

Hennen, contra.

MARTIN, J., delivered the opinion of the court.

This case was lately remanded from this court on the reversal of a judgment by which the Court of Probates had sustained a plea to its jurisdiction.

On the return of the case the Court of Probates ordered the partition which the plaintiffs had prayed for, and the defendants are now appellants from a judgment of which they complain, merely because the court disregarded the two following exceptions:

1. The defendants being minors, ought to have had a curator *ad litem* appointed to them, and the curator *ad hoc* was improperly given to them.

2. No family meeting is prayed for, and the court ought not to have proceeded without the opinion of a family meeting on the expediency of the partition.

It does not appear that the first judge erred in overruling either of these exceptions.

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were used. These terms are synonymous, and all so used in the *Code of Practice*, 116, 964.

II. Owners of undivided parts of an estate, have at all times the right of requiring a partition, and we are not acquainted with any exception to this principle in regard to minors. Proceedings in a suit for partition are now conducted according to the *Code of Practice*, and the *Acts of the Legislature*, passed since the great repealing act of 1828. Neither the *Code* nor any of these acts require the intervention of a family meeting for the partition of estates, in which minors are interested. We do not mean to say, because it would be unnecessary in the present case, whether if a licitation was necessary to effect a partition, the sale could or could not take place without the call of a family meeting.

It is therefore ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

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APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

Where a person pays a debt for another which he may be legally bound to pay, or have an interest in paying, he is thereby subrogated to all the rights of the creditor against the person for whom he has paid.

So where A stipulates with B to pay C a debt owing to the latter by B, according to the doctrine of *stipulation pour autrui*, A becomes C's debtor.

Where A stipulates with B to pay certain notes given by the latter to C, which are secured by mortgage, and A fails to make payment: *held*, on B's taking up his own notes, he is thereby subrogated to all C's right of mortgage against the property affected, even in the hands of a third possessor.

The act of subrogation must be evidenced by an authentic document; **EASTERN DISTRICT**
i. e. the payment made by the original promissor in the notes, must be **May, 1834.**
shown by a notarial act, to authorise an order of seizure and sale thereon.

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This case commenced by the hypothecary action against the defendant Thompson, as the third possessor of two lots of ground in New-Orleans. The plaintiff states in his petition for the order of seizure and sale, that on the 9th of November, 1831, he sold to John Green two certain lots of ground in New-Orleans, by a public act, in which Green stipulated to assume the reversion of a mortgage existing on said lots in favor of one Samuel Kohn, and also assuming to pay, at maturity, two certain promissory notes, one of one thousand and fifty dollars, and the other of nine hundred sixty-six dollars and sixty-six cents, given by Baldwin to said Kohn, his vendor, and as part of the price of said lots. When the notes became due, Green failed to pay them, and in the mean time sold and conveyed the lots in question to William T. Thompson, the present defendant. The plaintiff obtained an order of seizure and sale of the lots for the payment of said notes, by annexing the act of sale to Green and the two notes under protest with the usual affidavit, and also the act of sale from Green to Thompson, who is in possession. Thompson obtained an injunction against the order of seizure and sale on the following grounds: that by the plaintiff's own showing, it appears that the mortgage on which he attempts to exercise his hypothecary action against the property in question, was given by said J. Baldwin in favor of Samuel Kohn, to secure the payment of the promissory notes referred to, which notes were given by Joshua Baldwin to Samuel Kohn, for the price of said lots, and that said notes have been paid by said Baldwin, and the mortgage given to secure payment thereby extinguished; and that the act upon which the order of seizure and sale was obtained, does not import a confession of judgment to authorise the executory process, and that the enforcement of the order would occasion an irreparable injury.

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Baldwin took a rule on Thompson to show cause on the 15th of June, 1833, why the injunction should not be dissolved. The rule was discharged, and the injunction made perpetual.

Baldwin then answered to the injunction, that his proceedings in obtaining the order of seizure and sale as set out in that suit, were sufficient to maintain it, and made it part of his answer. The two suits were consolidated.

The certificate of the recorder of mortgages was produced on the trial, showing that in the acts of sale from Baldwin to Green, a mortgage was retained and recorded, and also in the act of sale from Kohn to Baldwin, which said act was recited in the above, and its obligations assumed by Green.

Upon this evidence the Parish judge decided that the mortgage of Baldwin to Kohn was extinguished by the payment of the notes which had been taken up by Baldwin, under protest, and that the act of Green to Thompson does not import a confession of judgment in favor of Baldwin, &c., &c.

There was judgment for the defendant, Thompson, perpetuating the mortgage and cancelling the order of seizure, &c.

The plaintiff appealed.

Strawbridge, for the plaintiff and appellant, contended that:

1. By the deed of sale Green engaged to pay the notes due by Baldwin, and assumed the reversion of the mortgage. This is a new agreement, the meaning of which is to be sought in the intention of the parties.
2. If it be not considered as a new mortgage, Baldwin had at least the privilege of a vendor, which has been recorded in uniformity with the provisions of the Code, and this is full authority for the suit.
3. Although the payment by Baldwin undoubtedly extinguished the original debt, yet it affected no accessory or

incidental obligation. A surety who pays, extinguishes the claim of the original creditor, but he may recover it from the principal debtor. In this case, as between Baldwin and Green, the latter was the debtor. Baldwin was also bound to Kohn, together with Green, and for Green; but upon payment, became subrogated to Kohn's rights against Greene. *Civil Code*, 2157.

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4. Thompson bought subject to Baldwin's claim, and all he stipulated for was that Green should pay; he relied on Green's personal security, and there is no reason that when this failed, he should take advantage of Baldwin's punctuality.

5. In relation to the objections as to the *via executiva*, when the defendant filed his opposition and obtained the injunction, the proceeding was changed to the *via ordinaria*, and the court will decree upon the whole matter.

Roselius, for the defendant and appellee, made the following points:

1. The principal question in this case is whether the mortgage granted by Baldwin to secure the payment of his notes in favor of Kohn, has been extinguished by the payment of those notes by Baldwin. A mortgage is an accessory obligation, which cannot exist after the extinguishment of the principal obligation. *La. Code*, 3374; *Shields vs. Brundige*. 4 *La. Rep.*, 326.

2. But it is said that in the sale from Baldwin to Green, the latter assumed to pay the notes of the former, and took the reversion of the mortgage. This, no doubt, created a new obligation on the part of Green towards Baldwin, which has not been impaired, and which can still be enforced.

3. It is not denied that the holder of the notes previous to Baldwin's taking them up, could have enforced the mortgage against the property.

4. But Baldwin is not subrogated to the rights of Kohn, for a person can no more be subrogated to the rights and

as they became due, in order to protect his credit by supporting a character for good faith and punctuality in his dealings. Having been thus compelled to pay some of these notes, he instituted the proceeding as above stated against the defendant as third possessor.

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The grounds relied on to obtain the injunction and those on which the court below made it perpetual are, 1st. That the mortgage retained by Kohn the vendor to Baldwin, was extinguished *pro tanto*, in consequence of the payment of the notes, &c. by the latter, being only an accessory to the principal obligation to pay the price. 2nd. That the act of sale from Green to Thompson imports no confession of judgment in favor of Baldwin. 3d. That no new mortgage is created by the act of sale from Baldwin to Green, as by that act Green only assumed the mortgage given by his vendor to Kohn, and the payment of the notes secured by it. And that, although, Green is responsible to Baldwin under his agreement to pay those notes which he failed to comply with, yet the latter has no right to proceed by executory process against the property in the possession of Thompson.

A considerable difficulty arises in giving a proper interpretation of this contract, from the vague, indefinite, and unmeaning manner in which the word reversion of Kohn's mortgage is used in the act of sale from Baldwin to Green. If this expression can be said to mean any thing in the way in which it is used, it must mean that Baldwin in the event of being obliged to pay the notes, the payment of which was expressly assumed by his vendee, then he, Baldwin, should be subrogated to all Kohn's rights resulting from the mortgage. But this is no more than would have occurred under express provisions of law, which declare that when one person pays a debt for another, which he may be legally bound to pay, or has an interest in paying, then he who pays is subrogated to all the rights of the creditor to whom he has made payment. Now we consider that the debts due to Kohn, according to the agreement between Green and Baldwin, was really the debt of the former, although

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5. At all events, Baldwin was not in possession of a title importing confession of judgment, and therefore not entitled to an order of seizure and sale. The fact of payment of the notes by Baldwin is matter *in pais*.

6. The holder of a note secured by mortgage, cannot resort to the *via executiva*, unless it has been transferred to him by authentic act.

MATTHEWS, J., delivered the opinion of the court.

In this case the plaintiff having obtained an order of seizure and sale of certain lots of ground in the possession of the defendant as a third possessor; the latter applied for and obtained an injunction against the summary proceeding. The action in its origin was hypothecary under the new proceedings established by the *Code of Practice*. On a final hearing of the case, which seems by the court below to have been considered as compounded of two; the original petition for the order of seizure and the application for the injunction, judgment was rendered by which the provisional injunction was made perpetual, from which the plaintiff appealed.

The cause is complicated and somewhat abstruse in its principles. It is shown by the evidence, that Baldwin had obtained the lots in question by purchase from Samuel Kohn, who retained a mortgage to secure the payment of the price, which was to be made by instalments as evidenced by certain notes which the purchaser was bound to pay at maturity. Baldwin afterwards sold to John Green, who assumed in favor of the seller the payment of the notes given by him to Kohn, and also the reversion of the mortgage held by the debtor. Green sold to Thompson the defendant in the case of the order of seizure and plaintiff in injunction, and Green did not pay and take up Baldwin's notes to Kohn as stipulated in the act of sale to the former, consequently the original promissor was obliged to pay them

as they became due, in order to protect his credit by supporting a character for good faith and punctuality in his dealings. Having been thus compelled to pay some of these notes, he instituted the proceeding as above stated against the defendant as third possessor.

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Where A stipulates with B to pay certain notes given by the latter to C, which are secured by mortgage and A fails to make payment, on B's taking up his own notes, he is thereby subrogated to all C's right of mortgage against the property affected even in the hand of a third possessor.

The act of subrogation must be evidenced by an authentic document; i.e. the payment made by the original promisor in the notes must be shown by a notarial act to authorize an order of seizure thereon.

the latter was also bound to Kohn. In pursuance of the doctrine of *stipulation pour autrui*, Green became Kohn's debtor by means of the act of sale made by Baldwin to the former, for he stipulated expressly to pay to Kohn the debt which Baldwin owed. This subrogation revived or rather kept alive in the hands of the person subrogated, all the rights of the creditor notwithstanding the payment made by the person subrogated. The court below was therefore in error by considering Kohn's mortgage as extinct by the payment of the notes made by Baldwin; it may be considered as dead in relation to the former but survives to the latter; who thereby has acquired a right to all Kohn's liens and privileges on the property mortgaged, if the act by which the subrogation took place appeared by an authentic document, i. e. if the payment made by the original promisor in the notes was shown by a notarial act. But the payment is not shown by authentic evidence. The court below was therefore correct in the opinion by which the executory or summary process was denied to the plaintiff. There is, however, error in the reasons given in the support of that opinion.

The privilege claimed in favor of the seizing creditor as vendor, is nowhere stated in the pleadings of the cause, consequently ought not to be taken into consideration.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be affirmed with costs; reserving to the plaintiff his right of action against Green, and also his right to pursue the mortgaged property in the possession of the third possessor, on proof of payment of the notes in question by authentic evidence.

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TRAIN RAIL
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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the vendor sells property at public auction *without title* to even a small part of it, the vendee to whom the adjudication is made, cannot be required to complete the sale and accept security.

The purchaser at public auction may object to the nullity of the sale to his vendor when it clearly appears that he has sold the thing of another.

The purchaser need not wait for eviction before he refuses to pay the price, or complete a sale which may subject him to the odium of a purchaser in bad faith.

The article 2535 of the *Louisiana Code*, which authorises the buyer who is disquieted or has reason to fear eviction, to withhold the price until security is given, applies to a buyer in possession who has accepted the sale, and not to one who discovers these defects before he accepts a deed from the seller.

It is of no avail that the vendor can give a good title to all but a very small proportion of the property sold. The buyer must have what he bought and *every part of it*.

The Rail Road Company sue the defendant to compel a compliance with the adjudication of certain lots by them to him, and to recover the first instalment due thereon, being one-fifth of one thousand six hundred and eighty dollars. In the month of June 1832, the plaintiffs caused a tract of land called the *Dascantel Plantation* to be sold in lots at public auction. The defendant bid one thousand six hundred and eighty dollars for five lots which were adjudicated to him, payable in one, two, three, four and five years. After the lapse of a year suit is brought for the first instalment, and to compel the defendant to give his notes for the remainder according to the terms of sale.

The defendant pleads a general denial and admits he was

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the last and highest bidder at the sale of all but one of said lots. But refuses to comply for the following reasons :

1st, That the company refuse to include in the deed of sale, certain conditions mentioned in the prospectus : "that cars will stop at the Dascantel faubourg at all times to put down and take in passengers;" and also, "that each person who may facilitate the communication between the city and the faubourg Dascantel, each person who may purchase a lot of the company in said faubourg, improve and reside on it shall be entitled to pass on the road in the company's cars gratis, &c., provided, that this privilege shall not continue beyond the year 1840."

2d. That the company cannot give him a good title to said lots of ground, and that he will be disturbed in his possession if he complies with the conditions of sale.

The defendant failed to appear at the trial either in person or by counsel.

The plaintiffs offered in evidence the process verbal of the auction sale, and the title under which they held the property.

The title consisted of a conveyance to the Rail Road Company by Madame Dascantel and her children, in which it appeared the property was community between the widow Dascantel and her late husband. There are several children who all joined in the conveyance with their mother, except two or three who were minors. These were to ratify when they came of age. The wife had a privilege claim of sixteen thousand dollars on the estate for her paraphernal property which protected nearly the whole title. A guarantee was given for the ratification by the minors.

The district judge in deciding the case considered it as presenting the question—"whether a court could or ought to compel a purchaser at auction who has not signed any act of sale, or given his notes, to accept a defective title with security against the defect and to complete the sale and purchase by signing an act and giving his notes, mortgage, &c."

There was judgment for the defendant.

The plaintiff's appealed.

Carleton and Locket, for plaintiffs

The title of plaintiff's is good, and if there be any defects security is offered to guarantee its validity. 7 Mar. N. S. 93. 7 Mar. 222. *Louisiana Code* 2386—2601.

The district judge should have ordered the defendant to comply with the terms of the adjudication.

Defendant in *propria personæ*.

1. This is neither a judicial sale, nor a sale by the Court of Probates. It is merely an adjudication by an auctioneer employed by private individuals. The auctioneer is to be considered in the same light as a *broker*, an *agent*, &c. &c. The art. 2535 of the *Louisiana Code* is, of course, not applicable, because the sale was not complete, the law imperiously requiring an authentic act. See *La. Code art.* 2585, 2586, 2588, 2415. *Duranton vol.* 16, no. 38.

2. Even had an authentic act been executed, the sale could still have been avoided. See art. 2427 of the *Louisiana Code*, corresponding to art. 1599 of the *Napoleon Code*. "*La vente de la chose d'autrui est nulle.*" *Merlin* is conclusive on this point, vol. 16, p. 368, *Verbo Vente*, vol. 16 of the *questions de droit*, *Brussel edition*. *Duranton* is of the same opinion, vol. 10, no. 437, page 456, 457, 458, 459.

MARTIN, J., delivered the opinion of the court.

The plaintiffs are appellants from a judgment which rejects their pretensions to the price of several lots, which they caused to be put up at auction and which were adjudicated to the defendant. He resisted their demand on the ground that one fourteenth part of these lots was the property of a minor, at the time the plaintiffs purchased them, and the minor's title to an undivided fourteenth never passed to the plaintiffs, is still in him, and consequently the plaintiffs were unable to transfer it to their vendee, a circumstance which must have been in the knowledge of the vendors at the time of the auction, which was not disclosed to the bidders.

The points of the appellants assert that they had a good title, which had passed to the appellee, and if this be not the case, still they ought to recover, as they have tendered ample security to the vendee.

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The record shows that at the time of the purchase of the plantation, (of which these lots constitute a part,) by the plaintiffs, and ever since, a minor owned an undivided fourteenth of the land, and his title has never been legally divested, and consequently the plaintiffs never had any legal title to this undivided fourteenth, and therefore could not transmit any to their vendee.

We have been referred to the case, of *Denis vs. Clagués Syndic*, 7 *Martin N. S.* 93 and *Griswold vs. Fulton*, 7 *Martin* 263 and *Code of Louisiana* 2586, 2601.

The counsel of the appellee has urged that both the cases cited differ materially from the present, which is that of a bidder who refused to comply with the terms of the auction, on the ground that the vendor's are not the owners of the thing sold, whilst the others were cases of vendees who had gone into possession, and had accepted their vendors deeds.

It is true that the first article of the Code to which we are referred, provides, that the adjudication is the completion of the sale, and the purchaser becomes thereby the owner of the object adjudged, and the contract is from that time subject to all the rules which govern ordinary contracts.

We have looked in vain in the articles which follow up to the 2595th., for any thing relating to the point under consideration. Those which follow the 2601st., relate to sales under a seizure or by execution.

The completion of a sale cannot vest in the vendee a title in the thing sold, which was not in the vendor, and the property of the latter is all that the former may acquire by the sale. In the present case as to the undivided fourteenth of the minor, the record shows the plaintiffs never had any title, they sold what was not theirs, the thing of another. In such a case our Code says the sale is null.

Where the vendor sells property at public auction without title to even a small part of it, the vendee to whom the adjudication is made cannot be required to complete the sale and accept security.

The vendee is not compelled to complete the sale and accept security. *Merlin's Questions de droit, verbo vente*, 10 *Duranton* 457 and 458. He may object to the nullity of the sale to his vendor, when it clearly appears that he has sold the thing of another, as his own, he need not wait for eviction or suit. The law does not compel him to complete a sale,

which cannot be honest by effect, and incur the odium and all the liabilities of a purchaser in bad faith.

The article 2535, which authorises the buyer who is disquieted by the action of mortgage or has just reason to suspect that he may be, to withhold the price till security be given, applies to a buyer in possession, who has accepted a deed from the seller and cannot be extended to the case of a buyer who discovers before he accepts a deed or possession that the seller sold the thing of another.

There is nothing in the objection which the appellants' counsel has presented to us in the proposition which the part of the premises to which they have a good title bears to the rest. The buyer must have what he bought and every part of it.

It is, therefore, ordered, adjudged and decreed that the judgment of District Court be affirmed with costs.

ORLEANS NAVIGATION COMPANY *vs.* ALLARD ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where it is clear from the testimony of the case that a road was not made in conformity to law; but it had been examined and received by persons duly authorized for that purpose; it was held that its original structure could not be enquired into.

The verdict of a jury on a question of fact unless clearly contrary to evidence will not be disturbed.

In 1830 the Orleans Navigation Company filed their petition, in which they alleged, "That by the 13th section of the act entitled an act for improving the inland navigation

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The purchaser at public auction may object to the nullity of the sale to his vendor when it clearly appears that he has sold the thing of another.

The purchaser need not wait for eviction before he refuses to pay the price or complete a sale which may subject him to the odium of a purchaser in bad faith.

The article 2535 of the La. Code which authorises the buyer who is disquieted or has reason to fear eviction to withhold the price until security is given, applies to a buyer in possession who has accepted the sale, and not to one who discovers these defects before he accepts a deed from the seller.

It is of no avail that the vendor can give a good title to all but a very small proportion of the property sold. The buyer must have what he bought and every part of it.

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of the territory of Orleans, the President and Directors of the said Company were authorized to lay out and construct toll-roads on each side of the bayou St. John, such road or roads to be constructed of shells, sand, or other hard materials, and to be at least of the breadth of twenty feet, and fit at all seasons for the passage of every kind of wheel carriages.

That Louis Allard, residing in the said parish and occupying a plantation with several negroes near to the said bayou, having proposed to the petitioners on or before the 23d day of July, 1819, to contract for the construction of such a road, it was agreed by and between the said parties, that Allard should undertake the construction of a road on the north side of the bayou; beginning at the point where the public road terminated to be continued to lake Pontchartrain; and to procure at his expense, the necessary materials, and to furnish, in like manner, the necessary hands therefor. The said road to be made in every respect such as is specified and required in the said thirteenth section of the said act; and the whole thereof to be so completed within the term of three years, according to the requisition and provision of the said section.

That Allard agreed with the plaintiffs that the said road should be always by him, during the existence of the said contract, kept in good order, condition, and repair; and that he should be answerable for all damages for his failure therein, and that in case of his continued neglect so to do, the petitioners should be authorized forthwith to take back the said road, in the same manner as if the term of twenty-two years mentioned in the subsequent article of their said contract had expired,

That for a considerable time during the year 1830, and previous to the 2d of April, the said road was not kept in good order, condition, and repair, conformably to the stipulations of Allard.

They pray that Allard may be ordered to deliver the said road to them, or to such person as they shall appoint to receive the same, and to pay to them one thousand dollars for damages.

And forasmuch as John Louis Rabassa pretends, without just cause, to have some right to the said road, and to demand money as toll for the passage on the said road, and keeps possession of a house and gate for the purpose of tolls. The petitioners pray that Rabassa may be made a party defendant; that he may be ordered to desist from demanding any tolls for the use of the road, and to relinquish to the petitioners the gate, and whatever possession he has of the road.

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Allard pleaded the general denial.

Rabassa denies that the plaintiffs have any right to the road in their petition described. He admits he is in possession of the road and alleges that he maintains the same in as good order as when he received it.

He alleges that intending to lease said road from the President of the Lake Pontchartrain Road Company for the term of three years from the 1st August, 1828, he gave his notes to Denis Prieur, acting as president of said company for three thousand dollars for said lease.

He alleges that said notes are void because no such company exists.

He alleges that believing such a company existed, he gave his notes aforesaid, intending to subject himself to all the legal obligations of a lessee and expecting from said company all the legal obligations of lessors; but that afterwards the project of said lease was drawn up at the request of Prieur before Felix de Armas, Esq. a notary public, containing such onerous conditions and which were never contemplated by the respondent that he was unwilling to sign or take said contract.

He prays, on account of his misunderstanding with said company if it exists, and because of no legal authority in Denis Prieur, president as aforesaid, to make said lease, that Prieur may be made a party to this suit on behalf of said company, that the intended contract with them may be declared null, that notes given by respondent in consideration thereof may be cancelled and given up to him and in default thereof, that Prieur and Allard may be condemned to pay him the amount of said notes with interest.

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The commissioners appointed by the Governor of the State to inspect the road made a report from which the following is an extract. "That after a careful survey and examination of the said road, of the bridges built thereon; and of the nature of the soil on which the whole stands, we are of opinion, that it is the result of considerable work and expence, and that although it does not appear that the said road is made of shells or sand, except in a few places where sand and shells are to be seen, the undersigned commissioners do not hesitate to pronounce that the said road is constructed of good and solid materials, and may be equalled in point of safety and convenience to the best roads in the State. That the bridges are built of the best materials and with great caution, and are more than twenty feet in breadth, the road which extends and is completed one league, is more than twenty-five feet in width, and in some places exceeds thirty feet, and that the general construction of the said road renders it fit at all seasons for the passage of every kind of wheel carriages."

The case of each defendant was tried separately.

Rabassa's case was first tried and a verdict given in his favor.

In Allard's case, Freret testified "That he has for several years past been in the habit of riding from the city to the lake by the Pontchartrain Road. Has never known said road in a good condition within eighteen months till within a few months past; he has been two or three times obliged to turn back, not being able to get to the lake; he has on other occasions been obliged to hire a coach, being afraid to drive his own gig, on account of the danger of being upset and injuring his horse. Being asked what was the general state of said road during the time before mentioned, he says, that it generally is overflowed or in a muddy state. On one occasion, witness and the other passengers in a coach, had to alight in order to get past a hole in the road where the driver said several carriages had already stuck. He is of opinion that it was impossible to keep said road in good order without raising it considerably; he has observed several deep and dangerous holes in said road which were

attempted to be covered by planks placed across and putting in branches of trees; he is of opinion, that horses were liable to be injured by getting into the holes; he thinks the road could not have been properly repaired by such means; he has seen carriages sticking in holes in said road. This road has been in the same state during the whole of the year 1830, and he thinks that by the attempt to repair it, as above mentioned, the road was made worse instead of better.

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Watts testified, that he had occasion to travel the Pontchartrain Road frequently during the months of January, February, March, April, and May, 1830, and was about twenty times at the lake during the course of the two latter months; he found the road generally very bad; he went on horse-back and considered the road as impassable for carriages during that period; that is to say, a carriage could not travel it without risk of breaking the harness or the carriage, or getting the horses stuck fast in the mud. The bridges were also very bad, particularly near the lake; he considered that he ran a risk of breaking his horse's legs every time he went by said road from the bad condition of the bridges; he recollects of going down on one occasion, and at least one third of the road from the house of Mr. Wells to the lake was covered with water to a depth of five or six inches. That the surface of the road before mentioned, is composed of mud, he presumes, from the swamp, and from the materials of which it is composed, must necessarily become bad after wet weather or after being overflowed.

Twenty-four witnesses were called on the part of the plaintiffs, including Messrs. Freret and Watts, whose testimony is given above, and examined relative to the condition of the lake road in the winter and spring of 1830. They all concurred substantially with the statements of the two witnesses as above.

Joseph Pilie, a witness for defendant Allard, says he knows lake road since it was made and examined it. In his opinion the only mode to render this road practicable for carriages at all seasons of the year, would be to pave it.

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with shells to a depth of about eight inches throughout its whole extent. That if the road was constructed of earth like the common roads of the country, it would at times by the passage of carriages, become in some places impassable till repaired. The usual mode of filling up holes in roads is by letting the ground dry; the mud is scooped out of the holes, and the hole then filled with dry earth or other materials. There are very high tides in Lake Pontchartrain two or three times every year. These sometimes happen during the month of March. In these high tides and in high winds the waters of the lake frequently cover part of the bayou Road near the bridge. In the opinion of witness, the Pontchartrain Lake Road would, even if raised eight inches higher by shells, be in some places covered with water in these high tides. In other places of the road this elevation of soil would place it above the waters of the lake. Witness has made a calculation of the expense of covering a road of thirty feet wide and three miles in length with shells to a depth of eight inches; the expense of this would be thirty-six thousand dollars. That during the spring and summer of 1830, as he thinks, the roads in the neighborhood of the city and the streets, were from a long continuance of wet weather, in very bad condition. They remained in this state for a considerable time for want of proper materials to repair them, and they were obliged in many places to place planks over the holes in roads and streets. The Pontchartrain Lake Road from the toll gate to the lake, could not be kept in proper repair for less than two thousand five hundred to three thousand dollars a year.

J. L. Rabassa, co-defendant, after verdict in his favor, was also permitted to testify in behalf of Allard. His testimony corroborates that of Mr. Pilie. Several other witnesses were called by defendant, whose testimony is the same, with slight variations of circumstances and manner.

The plaintiff took a bill of exceptions to the introduction of Rabassa as a witness, on the ground that he was a party to the original suit and lessee of the lake road.

After hearing much other testimony of a circumstantial

nature, having a remote bearing on the case, the jury returned a verdict for the defendant. From the judgment rendered on this verdict the plaintiffs appealed.

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May, 1884.

ORLEANS NAVY
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MATHEWS, J., delivered the opinion of the court.

In this case the plaintiffs claim the forfeiture of the lake Pontchartrain road, which had been made and constructed by the defendant, Allard, under an agreement entered into between him and the company, in pursuance of rights granted in the charter of incorporation. They pray a judgment ordering that he may deliver up the road to them. Rabassa, is also made a defendant in the suit, and judgment asked, requiring him to desist from claiming tolls, and to surrender a toll-gate and house in his possession. The defendants separated in their answers, and the cause was tried separately against each by juries. The defendant Rabassa obtained a verdict in his favor on the first trial. But no verdict was returned in favor of Allard until after two or three mistrials, in consequence of juries not being able to agree. He, however, finally obtained a favorable verdict. Judgments were rendered in favor of both defendants, from which the plaintiffs appealed.

The suit is founded on the fourth section of the agreement entered into between the plaintiffs and Allard, as above stated. The company having authority granted them by the thirteenth section of the act of incorporation, to make a road on each side of the bayou St. John, and after completing and causing to be constructed and completed a road of a specified description on either side of the Bayou, to demand tolls according to a tariff established by the law, contracted with the defendant Allard who undertook to make and construct a road on one side for and in consideration of a right conferred on him to receive the tolls for the term of twenty-two years, &c. The act which authorised the construction of these roads, required that they should be made of certain materials designated, and constructed in a particular manner and form, which were to be judged of by their commission-

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Where it is clear from the testimony of the case, that a road was not made in conformity to law; but it had been examined and received by persons duly authorised for that purpose. It was held that its original structure could not be inquired into.

ers under oath, who were to receive their appointments from the Governor. The work after having been completed by the contractor, was submitted to the inspection of commissioners duly appointed, who reported favorably upon it. The road was received, and tolls collected for the benefit of the undertaker without opposition or interception, until the commencement of the present action.

It is clear from the testimony of the cause, that the road in question never was made in conformity with the requisitions of the law. But as it was examined and received by persons duly authorised for the purpose, we are of opinion that its original structure is not to be inquired into in the present case.

The main question on which the decision of this cause rests, arises out of the section of the contract upon which the action seems to be based. We shall leave out of view the private association under the title of the Pontchartrain Road Company, in which the plaintiffs appear to have taken part, and which was composed of the defendant Allard and others, by agreement subsequent to his contract with the company, as having no bearing on the decision of the case. Nor is it necessary, according to the opinion which we have formed on the merits of the cause, to examine the bills of exception found in the record.

The forfeiture of the defendant's rights acquired under the contract, and consequent surrender of the road to the plaintiffs, are claimed in consequence of its having been suffered to remain in bad order and condition for want of necessary repairs, which the contractor continued to neglect to make or cause to be made. It is easy to perceive that the question involved in this statement is merely one of fact, to which the jury have the best right to answer.

Many witnesses were examined as to the condition of the road at various periods; all persons who had travelled on it. The result of their testimony seems to be, that when the weather was dry the road was good, and that when much rain had fallen or the water from the lake had been blown over it by storms, it was bad, sometimes impassable. These

facts, assumed from the testimony, do not, however, clearly establish the main fact, on which alone the plaintiffs have a right to recover in the present form of action, since the undertaker and constructor continued to neglect to make the necessary repairs. Being a question of fact, the verdict of the jury, as it is not clearly contrary to evidence, ought not to be disturbed. The verdict and judgment in relation to the defendant Rabassa, may be considered in the light of corollaries of the main proposition, touching Allard's rights.

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VS.

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ET AL.

The verdict of a jury on a question of fact, unless clearly contrary to evidence, will not be disturbed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

Strawbridge, for the plaintiffs and appellants.

Dennis and Preston, for the defendants and appellees.

MINORS OF FOULTNEY vs. BARRETT ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The articles 1034 to 1040 seem to require the appointment of an administrator in every case where a succession is accepted with benefit of inventory.

Where heirs are of full age, under every circumstance, without regard to the manner in which the inheritance is thrown on them, an administrator should be appointed.

But a tutor duly appointed, or one on whom the office devolves by operation of law, represents the minors under his charge in all civil suits or acts, and has the administration of their estates.

The tutor can, under the authority of the general administration to collect and sue for debts, institute suit in behalf of the minors, for the recovery of a debt due the succession.

EASTERN DIS. Where a succession is accepted with the benefit of inventory, and some of the heirs are of full age and others are minors, it should be left to the

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administration of the tutor of the minors until partition.

This is an action of revendication for a lot of ground in the city of New-Orleans. The plaintiffs, Matilda and Emily Poultney, minors over twelve years of age, assisted by their mother as natural tutrix, and J. R. Grymes as under tutor, on the 11th of February, 1833, instituted this suit against the defendant Barrett, who is in possession, to recover a lot of ground situated on Canal street. They allege that they are the legitimate children of John Poultney, deceased, and Emily Tauton his wife. That John Poultney died on the 23d of October, 1819, and was at the time of his death, the proprietor and possessor of the lot of ground in contest. Poultney acquired this lot by purchase from B. P. Porter and Felicite Depeyster, widow of W. A. Depeyster, deceased, and tutor of W. A. Depeyster, a minor, by a notarial act dated May 5th, 1818. This sale purports to have been made in virtue of an order or decree of the District Court, authorising the sale of the joint property of the late firm of Porter & Depeyster. Porter & Depeyster acquired this property by purchase from the corporation of New-Orleans, by public act dated 19th May, 1812, subject to a rent charge or interest at six per cent., payable quarterly, and irredeemable for thirty years, with right of entry, and forfeiture in case of non-payment.

The plaintiffs allege that Barrett is a possessor in bad faith, and is responsible also for fruits, rents and profits. They pray for a surrender of the property, and for rents and profits.

Barrett denied the plaintiff's claim and right to the lot, and asserted himself to be the true owner. He sets out a chain of title derived from the corporation of New-Orleans, avers that he purchased from William Deacon, whom he calls in warranty, and pleads the prescription of ten years.

Deacon answered: First, Denied that the plaintiffs ever legally accepted the succession of their ancestor, John

Poultney, or were legally put in possession of it, and therefore cannot maintain this action.

Second, That John Poultney never acquired the lot in question, and that his heirs have no title to it.

Third, That said lot was conditionally sold by the corporation of New-Orleans to Porter & Depeyster, by notarial act of the 19th May, 1812. That said condition was never complied with, the rent charge was not paid, and the lot was forfeited to the corporation; and that on the 21st of December, 1822, George Loyd, who had been put in possession by the corporation, was ordered to sell the lot by the District Court to pay the amount of the rent due, which was accordingly sold to this respondent for a full and valuable consideration, by notarial act of the 18th of January, 1823.

Fourth, That by the condition of the sale of May 19th, 1812, the vendees of the corporation agreed if they petitioned for a respite or cession of property, they should forfeit all title to said lot and hold the same merely as tenants, at will of the corporation; and if the title to the lot was ever assigned or sold to Poultney as the plaintiffs allege, he petitioned for a respite and failed, and his property, including this lot, was placed in the hands of syndics and sold to respondent by order of the District Court, as appears by the deed of sale, dated the 18th of January, 1823, whereby Poultney and his heirs forfeited all title to the lot in question.

Fifth, The respondent calls the corporation of New-Orleans in warranty, and if evicted, makes claim for amelioration.

Barrett, in an amended answer, calls John Hagan, from whom he purchased half of the lot, in warranty. Hagan calls in Deacon, and joins Barrett in the defence.

The corporation deny all the allegations in plaintiff's petition and in the answer of defendants, and pray to be dismissed.

By agreement of counsel, this case was to be tried on the question of title only, between the plaintiffs and defendant Barrett; the question of the liability of the parties called in warranty, to be afterwards determined.

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& AL.

The case proceeded before the court in conformity to this agreement.

The plaintiffs offered in evidence the notarial act, dated the 5th of May, 1818, of the sale of the lot in question, by B. P. Porter, and Felicite Depeyster, widow and inheritrix of W. A. Depeyster, deceased, and as tutrix of W. A. Depeyster, a minor son, and B. Levy, under tutor to said minor, to John Poultny. These persons declare that said sale was made in virtue of a decree of the District Court, authorising the sale of the joint property of the late firm of Porter & Depeyster. It was sold subject to the conditions of the grant to Porter & Depeyster, of the 19th of May, 1812, and subject also to a certain lease for four years, &c. The act is signed by the vendor, witnesses and notary, but not by Poultny.

The city treasurer testified that the taxes were assessed on this lot in the name of Poultny, in 1818, and paid by him. In 1819, it was assessed in the name of the succession of Poultny. Its identity with the one in this suit was admitted.

Mrs. Poultny's renunciation of the community between her and her late husband, made in 1820, was next offered. The record of all the proceedings in the Probate Court relative to the succession of Poultny, which commenced with affixing the seal on the 25th of December, 1819, to the final acceptance of the succession, with the benefit of inventory, by Mrs Poultny, for the minor heirs of said John Poultny, deceased, and homologation of the inventory by the Probate judge, on the 3d of April, 1823, were then offered in evidence. Here the counsel for the plaintiffs rested the case.

The counsel for the defendants then moved the court that the plaintiffs be *non-suited*, as not having made out a *prima facie* title to the premises in question.

Second, That the defendants have the right reserved, in case the court refuses to entertain the motion to offer evidence of their title.

Third, That if insufficient title be exhibited by the plain-

tiffs to enable them to recover, the defendants are not bound to go into their evidence; and that they have a right to the opinion of the court on these points without prejudice to their rights on the merits, if the decision be against them.

The counsel for the plaintiffs denied the existence of such practice, and that the defendant must put his case before the court, so that judgment might be rendered for one or the other of the parties.

Second, The mode of proceeding in suits in courts is prescribed in the *Code of Practice*, that after the plaintiff has gone through his evidence, the defendant must offer his, or abandon his right to offer any, if he thinks that the plaintiff has failed to make out his case. *Code of Practice*, art. 476, 467.

The district judge entertained the motion for a *non-suit*, and gave his reasons therefor. After hearing the arguments of counsel, the court gave a judgment of *non-suit* against the plaintiffs.

The court, after investigating the plaintiffs' title offered in evidence, allowed the *non-suit* on the following grounds, not raised by the parties in the pleadings:

First, As a legal acceptance of the succession of Poultney by his heirs, was specially denied, it was incumbent on the plaintiffs, as beneficiary heirs, to show such legal acceptance.

Second, That the only evidence of such acceptance in this case, is in the petition of the mother of the heirs, praying for the homologation of the inventory, signed by an attorney at law.

Third, An acceptance of a succession by beneficiary heirs, is an act not within the scope of the duties of an attorney at law. It is a personal act, which must be done by the party himself.

1. Where a succession is accepted with benefit of inventory, there must be an administrator appointed. *La. Code*, 1034.

2. Tutors or curators of minors may claim the preference as administrators, but they are bound to give security. *La. Code*, 1037.

3. This suit was instituted on the 11th of February, 1833,

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and the order, accepting with benefit of inventory, as given on the petition signed by counsel for the homologation of the inventory, is dated April 3d, 1833, so that the minors could not have been administrators.

A rule for a new trial was taken and discharged, and the plaintiffs appealed.

Slidell, for plaintiffs.

1. The motion for a non-suit cannot be sustained; a defendant cannot apply for a non-suit; if he thinks the plaintiffs' testimony insufficient he may submit his case for a decision; but if not, he must produce his evidence. *Code of Practice*, art. 476, 477, 536. *Kernion vs. Guenon*, 7 *Martin*, 171, *N. S.* *Bore vs. Bush*, et. al. 6 *Martin*, *N. S.* 1.

2. The judge of the District Court, bases his decision entirely upon precedents of courts of common law, they can have no authority, the use of words peculiar to common law, cannot be considered as an adoption of English practice. *Agnes vs. Judice*, 3 *Martin* 185. *Hunt vs. Norris* et. al. 4 *Martin* 528.

3. The absence of an administrator, was a matter of exception and should have been pleaded in *limini litis*. *Code of Practice*, art. 327, 333. An exception if not disposed of before trial on merits, is supposed to be waived. *Rowlett vs. Shepherd*, 4 *La. Rep.* 91. *Kemps Heirs vs. Hunt*, et. als. 4 *La. Rep.* 482.

4. Neither acceptance of succession, nor appointment of administrator are required. *O'Donald vs. Lobdell*, 2 *La. Rep.* 301. *Erwin's Heirs vs. Orillion*, 6 *La. Rep.* 205, lately decided. *Dufour vs. Camfranc*, 11 *Martin*, 713.

5. The evidence introduced was sufficient to put the defendants on their proof. *Joseph vs. Moreno*, 2 *La. Rep.* 461. *Crocker vs. Nuley*, et. al. 3 *N. S.* 583. *Pignatel vs. Drouet*, 6 *N. S.* 432.

6. Defendant calling vendor in warranty, is bound by his pleadings. *Delacroix vs. Cenas' Heirs*, 8 *N. S.* 356. He is

not bound to call upon him, but if he does, must take him "cum onere" unless fraud or collusion be alleged.

7. The answer of Deacon admits title in Poultney, and he cannot avail himself of his general denial. *Vavas seur vs. Bayon*, 11 *Martin*, 640. *Murray vs. Bossier*, 10 *Martin*, 293. *Bryans vs. Dumseth*, 1 *N. S.* 412. *Dean vs. Jackson*, 1 *N. S.* 127.

8. Party cannot set up nullity of title under which he claims. *Trahan vs. M'Manus*, 2 *La. Rep.* 209. *Verrets Heirs vs. Candelle*, 4 *N. S.* 402.

Pierce, Preston and Eustis, for the defendants, Barrett, Deacon and the Corporation, relied on the following grounds.

1. That this is a petitory action and the plaintiffs have not made out a complete legal title, and such a one as is required to put the defendants on their defence. *Code of Practice*, art. 44.

2. The title is defective as it rests on an act of sale of minor's property before a notary and is void upon its face. 8 *Martin*, 631. 4 *La. Rep.* 269, 270.

3. The act or deed does not even convey Porter's interest, for the sale is alleged to be made in pursuance of a decree of partition, and if so is illegally made and is void as to all parties. *Civil Code*, art. 258, p. 206.

4. The decree referred to in the act should have been produced and proof of sale by auction.

5. The extent of Porter's interest does not appear, and a party who sues for the whole, cannot recover a part.

6. The plaintiff must show his vendor's title and possession, to wit, that of Porter and Depeyster, and that it is one translativ of property.

7. No possession is shown in Poultney. He never signed the act of sale to him; and if notes were given and paid, they ought to be produced.

8. This lot being placed on the assessment roll of the City or Parish of New Orleans in Poultney's name is no evidence of his possession or even of payment of taxes.

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MARTIN, J. delivered the opinion of the court.

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But a tutor duly appointed, or one in whom the office devolves by operation of law, represents the minors under his charge in all civil suits or acts and has the administration of their estates.

The tutor can, under authority of the general administration to collect and sue for debts, institute suit in behalf of the minor, for the recovery of a debt due the succession.

The minors are appellants from a judgement of *non-suit*, given against them on the ground that no administrator had been appointed to the estate of their deceased father.

This decision is directly in contradiction with that which we lately pronounced in the case of *Erwin et als vs. Orillon, ante, p. 205*, which we have reconsidered, and it has not appeared to us proper to change the opinion then formed.

It is, therefore, ordered, adjudged and decreed, that the judgement of the District Court be annulled, avoided and reversed, the non-suit set aside, and the case remanded for trial, the appellees paying costs in this Court.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The endorsers of notes given to the corporation of New-Orleans, in pursuance of an express agreement, to secure the payment of a *deficit* discovered to be due by the city treasurer, for whom the endorsers are already sureties for the faithful administration of his office as treasurer, cannot discharge themselves on the ground that said notes were executed in error, because it is alleged they were not bound under their surety bond,

It is not every error that will invalidate a contract. The error must be in some material point, such as in the motive or consideration, the person with whom it is made, or in the subject matter of the contract.

Considered as mere endorsers, there is nothing showing why the defendants endorsed the notes in question, and as between the holders and endorsers a plea that they endorsed without consideration would not avail them.

The surety is discharged when by the act of the creditor the subrogation of EASTERN DIS.
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 his rights, privileges and mortgages, can no longer be operated in favor of
 the surety.

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Where the corporation of New-Orleans released a mortgage in their favor on certain property of the city treasurer, without the consent of one of his sureties; *held*, that the surety is discharged thereby.

But where a co-surety is present and consents to the release of a mortgage on the property of the principal debtor and that it be sold and applied to the payment of a deficit for which he is bound in a surety bond, he is not thereby released, although his co-surety not consenting and bound *in solido* with him, is released.

The laws of the United States requiring the accounting officers to examine and settle the accounts of their debtors at stated periods is directory and constitutes no part of the contract with the sureties; and a failure to call them to account does not discharge the sureties.

When the city treasurer is re-elected his new bond is for a new contract, and the sureties who sign it cannot avail themselves of a neglect of duty to call the treasurer to account for defalcations of the past year.

Where an obligation is valid as to the principal obligor, the sureties cannot avoid responsibility incurred under it without showing they were deceived and induced to sign it by devices intentionally practised on them.

If the city treasurer under a resolution of the city council employs a book-keeper, and puts it in his power to withdraw money from the treasury without the warrant of the mayor, and to disguise his peculations by false entries and fraudulent accounts, instead of being a mere book-keeper, he becomes the confidential agent of the treasurer who is liable for his misconduct.

This case is composed of two suits instituted by the corporation of New-Orleans against Charles L. Blache, late treasurer, and his sureties, the first on a promissory note for three thousand one hundred and twenty-seven dollars and twenty-

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and endorsed by Joseph Le Carpentier and Martin Blache.

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The petition alleges that the corporation holds a note of three thousand one hundred and twenty-seven dollars and twenty-six cents, dated 22d September 1829, signed by C. L. Blache, payable to the order of Joseph Le Carpentier and Martin Blache, and by them endorsed, which they have failed to pay, and prays judgment angainst them *in solido*. The parties answered separately. C. L. Blache the drawer plead a general denial, admitted his signature and puts the plaintiffs on strict proof of his indebtedness. Joseph Le Carpentier and Martin Blache, admitted their endorsement, but denied their liability, and averred the note sued on, with four others were endorsed by them in pursuance of an agreement with the plaintiffs and the drawer, which agreement was founded and executed in error whereby their obligation is not binding. They annex the agreement to their answer as part of it, and pray to be dismissed, and that the other four notes endorsed by them at the same time and under the same agreement, be ordered to be delivered up and cancelled as having been given and executed in error.

The agreement was made by a public act on the 20th of October, 1829, and signed by the Mayor on the part of the Corporation, C. L. Blache, city treasurer, and Le Carpentier and Blache as his sureties. Its object was to give time of one, two, three, four and five years to the treasurer to pay a deficit of fourteen thousand seven hundred fifty-one dollars and twenty-six cents, occasioned by the infidelity of one of his collectors, for which he was considered responsible, on executing his notes, with Le Carpentier and M. Blache as endorsers.

The endorsers averred that they were not liable on their

original bond as the sureties of the treasurer for this EASTERN Dis.
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defalcation, and that the notes were executed in error.

The corporation of New-Orleans about the same time MAYOR ET ALS
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instituted suit against the city treasurer, C. L. Blache, and his sureties, to recover a deficit in the city funds of forty-four thousand four hundred thirty-seven dollars and eighty-eight cents, which was alleged as having accrued from the year 1823 to 1829, both inclusive.

The petition states that the said Blache was annually appointed city treasurer, and gave bond each year for the above period with two sureties in the sum of twenty thousand dollars. Joseph Le Carpentier and Nicolas Lesconfair signed as sureties for the years 1823, '24 and '25; Joseph Le Carpentier and Joseph Jardela signed as sureties for the year 1826, and the said Joseph Le Carpentier and Martin Blache signed as sureties for 1827, '28 and '29. In all of which bonds C. L. Blache binds himself as principal, and the other persons as his sureties *in solido*, conditioned for the faithful performance of the duties of the office of treasurer of the city of New-Orleans.

The petition charges that it was the duty of the city treasurer to receive and pay over all monies, and to keep regular accounts of the real and personal property, and to collect the rents belonging to and due the corporation; and that during the time from the year 1823 to 1829 inclusive, the said treasurer received all the revenues and monies accruing to the city, but failed and refuses to account for a large sum, to wit: the sum of forty-four thousand seven hundred and nineteen dollars, for which he is a defaulter, and together with his several sureties, is liable to pay and reimburse to the corporation.

The plaintiffs then expressly charge that said C. L. Blache and his sureties for the year 1823, are liable for two thousand five hundred eighty-one dollars and fourteen cents, a deficit which occurred that year, after signing the treasurer's bond. That they are liable for eighteen thousand one dollars and eighty-four cents, the amount of the deficit for the years 1824 and '25; and for four thousand two hundred fifty-four

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dollars and ten cents, the deficit for the year 1826; and for one thousand eight hundred seventy-five dollars and fifty-two cents, as the deficit accruing between the 4th of September, 1827, and the 10th of October, 1829; and also for eighteen thousand six dollars and thirty-five cents, which the treasurer retained from the treasury, and for which he became a defaulter on the 8th of December, 1829, making together the aggregate sum of forty-four thousand seven hundred and nineteen dollars.

The plaintiffs allege that the treasurer is liable for the whole amount of this defalcation, and that the sureties are liable for the several sums which accrued during the years for which they signed the treasurer's bonds respectively. They pray judgment against C. L. Blache for the whole sum claimed, and also *in solido* for the same sum against Joseph Le Carpentier, who signed the treasurer's bonds for each of the years during which the alleged deficits accrued; and against Nicholas Lesconflair for twenty thousand five hundred and eighty-three dollars, and against Martin Blache for twenty-four thousand one hundred and thirty-five dollars, being the sums which accrued respectively during the years for which they signed the treasurer's bond as sureties.

C. L. Blanche, the principal, pleaded a general denial.

Le Carpentier, widow Lesconflair and M. Blache filed their separate answers and pleaded the general issue, but admitted their respective signatures to the bonds of the treasurer for the years charged to them, and alleged that they were executed in error; and that the corporation, by a public act of the 13th of May, 1826, acknowledged the correctness of the treasurer's accounts up to that period, and discharged one of his sureties, (Lesconflair) who had signed the three first bonds sued on, whereby the co-surety was also discharged in consequence thereof; and that the plaintiffs cannot recover of him, Le Carpentier, because they are unable to subrogate him to their rights, privileges and mortgages, accruing from the first three bonds against the principal therein, having impaired said rights, privileges and mortgages by their said acts; whereby this defendant is

virtually discharged. Le Carpentier further stated that he signed the remaining four of the treasurer's bonds as surety in error, which was caused by the plaintiffs, and prayed to be discharged.

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The two suits were consolidated and tried together.

Martin Blache, in an amended answer, alleges that the bonds signed by him as surety for the treasurer, for the years 1827, '28 and '29, and also his endorsements, were executed in error, believing as he did that the treasurer, at the time of entering into each of said bonds, had rendered faithful accounts of his administration for each preceding year; that he was induced to this belief by the gross misconduct and negligence of the plaintiffs in examining and approving said accounts, declaring the accounts of the said treasurer correct, and annually re-electing him, which the defendant charges as amounting in law to *dol* or *faud*; that he never would have signed said bonds, had the *deficits* of the treasurer been made known to him before or at the time of signing them, as it was the duty of the plaintiffs to have done; that by reason of this *fraud*, the said bonds and his endorsements are *void*, or at least *voidable*.

Le Carpentier, in an amended answer, made the same allegations in relation to his suretyship, arising from his endorsement of said notes, and signing the bonds of the treasurer for the years 1823, '24, '25, '26, '27, '28 and '29. A similar amended answer was put in by widow Lesconflair, in behalf of her deceased husband, who signed as surety the bonds of the treasurer, for the years 1823, '4 and 5.

Upon these issues the parties went to trial.

The evidence introduced was voluminous, embracing all the proceedings of the city council, the books of accounts of every description during the period of the alleged defalcations, and other documents and testimony of witnesses, chiefly relating to the state of the treasurer's accounts, the amount of his deficits, the time they accrued, and how they occurred. The question of the liability of the sureties was made mainly to depend on the fact of the corporation having settled the accounts of the treasurer annually, and proclaimed them

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correct up to the year 1829, by which, as the sureties allege, they were induced to become his bondsmen.

The district judge considered the arrangement of the 20th of October, 1829, and the notes executed and endorsed to cover the sum of fourteen thousand seven hundred fifty-one dollars and twenty-six cents, the amount of Guerin's deficit, by the treasurer and his sureties as made in error, and should be considered as though it had never been made. But he considers the treasurer responsible for the whole deficit; the faults of Guerin, his book-keeper, will not excuse him. In relation to the deficits of the treasurer, the district judge remarks that the sureties are not liable, because "it is in evidence that a committee of finance was appointed annually to examine the accounts of the treasurer, that they annually made their report approving his accounts, and he was annually re-elected by a unanimous vote; that the tacit mortgage which the corporation had on the property of the treasurer, was by their organ, the mayor, from time to time raised, and the property sold, or a very large part of it.

"There were two plain principles of law applicable to this case, by either of which the sureties are exonerated. The one is, 'that if a surety suffers an injury resulting from the negligence of the creditor or obligee, he is discharged.' 2. 'That if a creditor has, by his own act, disabled himself from ceding his actions against his principal debtor, to which the surety has an interest to be subrogated, the surety is discharged.' The plaintiffs, by raising the tacit mortgage, which they had on the property of the treasurer, enabled him to sell his property, and disabled them from ceding their action of mortgage to the sureties."

The district judge gave judgment annulling the arrangement and transaction of the 20th of October, 1829, and in favor of the corporation against C. L. Blache, for fifty-nine thousand four hundred and seventy-one dollars, and interest thereon, and discharged the sureties.

The corporation appealed.

Eustis, for the corporation of New-Orleans, made the following points in argument:

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1. The evidence establishes conclusively the liability of the principal debtor.

2. The bonds of the sureties must be enforced, unless the sureties can prove that they have been legally discharged, or that their obligations were originally null.

3. As to any fact, tending to discharge them, the burthen of proof rests with them; they holding the affirmative of the proposition. *Civil Code*, 2229.

4. The error, gross neglect or fraud, set up in the defence, must be proved. *Civil Code*, art. 1842.

5. The error or fraud must be such as to effect the nature and substance of the contract. *Civil Code*, art. 1835 to 1839, 1841.

6. If the error relate to an accidental matter of the contract, unless it be the principal cause of making it, it is not a cause of nullity. *Pothier on Obligations*, no. 18. *Merlin's Rep. de jurisprudence*. *Verbo Erreur*. 6 *Toulier*, no. 39. *Voet com: ad Pandectas*, lib. 18, tit. 1, sec. 4, 5, 6.

7. In the contract of surety, the relations between the parties are necessarily of so intimate and confidential a character, that *in the absence of any proof*, the motive or principal cause of the contract cannot be assumed, because it cannot be known. Therefore it cannot be ascertained, without any proof, that the parties contracted through error.

8. The neglect of the committees of the city council as to the examination of the accounts of the late treasurer, ought to have deceived no one, for by a solemn decision of this court, reports of committees of the legislature examining the accounts of the treasurer of the state, are considered as not being made with any particular care or attention to details. 8 *Martin, N. S.*, 642, *Louisiana Insurance Co. vs. Morgan*.

9. The laches imputed to the committees of the city council, appointed to examine the treasurer's accounts being

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unaccompanied with fraud or deceit, forms no ground for nullity or discharge of an obligation like this under consideration. The examinations are for the benefit of the creditor *alone*, and form no part of the contract between the creditor and the sureties. *Vide United States vs. Kirkpatrick*, 9 *Wheaton*, 734; in which the case of the *People vs. Jansen*, in 7 *Johnson's Reports*, is overruled. The *United States vs. Vanzandt*, 11 *Wheaton*, 185, in which the case of the *United States vs. Kirkpatrick*, is revised and confirmed.

Morphy, for the defendants and appellees, made the following points:

1. That the late Nicholas Lesconflair has been fully released and exonerated from all liability, as appears from the notarial deed of the 13th of May, 1826, and the letter of the mayor to the city council, of the 22d of April, 1826.

2. The bonds of 1824 and '25, subscribed by Nicolas Lesconflair, are not binding on his heirs, having been every year signed by him through error, that is, under the belief that the previous accounts of the treasurer were correct, and that he owed nothing to the corporation; which error has proceeded from and been created by the acts of the corporation.

3. That the heirs of Nicolas Lesconflair must be discharged, because the city council, by their own acts, have placed themselves in the impossibility of subrogating them to the mortgage which the corporation had on the property of the treasurer, under the old *Civil Code*, p. 457, art. 25. In consequence of said release, the property, subsequently sold in 1829, by virtue of the agreement entered into on the 20th of October, 1829, was found free of the mortgage, resulting from the bonds of 1823, '24 and '25.

4. In relation to Le Carpentier, the release granted to Nicolas Lesconflair on the 13th of May, 1826, discharged Le Carpentier, who was jointly bound with him. *Civil Code*, art. 2199 *Toullier, &c.*, 7, p. 401, no. 331.

5. The bonds from 1823 up to 1829, were subscribed through error. EASTERN DIS.
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6. The bonds of 1827, '28 and 29, each of them releases the previous bonds and cancels the mortgage resulting from them, and shows clearly that the sureties never intended to be responsible at one time for more than twenty thousand dollars, and were always under the impression that Blache owed nothing to the city for previous years, and that his property was fully sufficient to cover that sum. MAYOR ET AL'S
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7. That an examination of the cash having never taken place since 1822, no one can say when the deficiency, if any exists, took place.

8. That the settlement of the 20th of October, 1829, and the endorsements given in pursuance thereof, are not binding on M. Blache or Joseph Le Carpentier, the same having been subscribed through error: 1st, Because believing themselves bound under their bond of 1829, for all deficits of said year, they made this settlement under the impression that the sum of fourteen thousand seven hundred fifty-one dollars and twenty-seven cents, was the only existing deficit, and that they were bound for it. 2d, Because the said sum of fourteen thousand seven hundred fifty-one dollars and twenty-seven cents, instead of belonging to the year 1829, as stated in the settlement, is made up of the arrears of taxes and ground rent, back to 1818, when none of these parties were sureties. Every year the treasurer becomes liable for all arrears up to the first Monday of October, unless he proves that he has used due diligence to collect; therefore the sureties of each year ought to have been made responsible; if they have not, the sureties of 1829 cannot be made responsible.

9. That the sureties ought to be exonerated, because the city council, by their improper interference and conduct in relation to the treasury, and the keeping of the books, have created such confusion and embarrassment in the books and accounts of the treasurer, that the latter appears to have received large sums of money which have never come into his hands.

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10. That the sureties are not bound *in solido*, the clause or condition of solidarity having been casually inserted in the bonds, although not contemplated by the law under which the bonds were given. 2 *La. Reports*, 397, *Boswell vs. Lainhartt*.

The case was further argued by Mr. *Mazareau* and Mr. *D. Seghers*, for the defendants.

BULLARD, J. delivered the opinion of the court.

These two cases, relating to alleged defalcations in the accounts of one of the defendants, as treasurer of the city of New-Orleans for a series of years, were consolidated and tried together in the District Court. Judgment was rendered in favor of the sureties and endorsers, and on the appeal both have been argued together. We shall consider them separately, beginning with that which relates to the notes given for the supposed deficit of 1829 occasioned by the infidelity of Jean Guerin.

In this first case the corporation sues to recover the amount of a note drawn by C. L. Blache, then treasurer of the city, and endorsed by Joseph Le Carpentier and Martin Blache, which was protested for non-payment at maturity.

The drawer admits that he signed the note but denies that he owes any thing to the plaintiffs and requires strict proof.

The endorsers of notes given to the Corporation of New Orleans in pursuance of an express agreement, to secure the payment of a deficit discovered to be due by the City Treasurer, for whom the endorsers are already sureties for the faithful administration of his office as Treasurer, cannot discharge themselves on the ground that the said notes were executed in error, because it is alleged they were not bound under their surety bond.

The endorsers admit in their answer that they endorsed the note, but they allege, that it was given and endorsed together with four others of the same date, amounting in all to fourteen thousand seven hundred and fifty-one dollars and twenty-six cents, in pursuance of an agreement between the defendants and the mayor of the city of New-Orleans, on the 20th October 1829, which they allege was altogether founded and executed in error, and consequently, not obligatory. This agreement, which is annexed to the answer, entered in pursuance of several resolutions of the city council, recites that C. L. Blache having been appointed city treasurer for the current year, the other defendants had become his sureties in

a bond in the penal sum of twenty thousand dollars, that the treasurer had lately sustained a loss of fourteen thousand seven hundred and fifty-one dollars and twenty-six cents, by the infidelity of Jean Guerin his collector, which loss is acknowledged to relate to his administration for the year 1829, that in order to enable him to meet this deficit, the city Council had offered to give the treasurer and his securities, a delay of one, two, three, four and five years to reimburse the treasury, upon the treasurer giving five notes endorsed by his securities, making together the amount of the loss with interest at six per cent added. The parties declare that it is well understood, that this arrangement is not to operate a novation, but the bond for the faithful administration of the treasurer shall remain in all its force and vigor for the sum and cause therein stipulated until he shall be regularly discharged. It is further stipulated that Le Carpentier and M. Blache are bound for the notes merely as simple endorsers, the payment of these not being secured by the mortgage resulting from the original bond. This agreement appears to have conformed to the terms and conditions required by the resolutions of the city council, a copy of which is annexed to the act and expressly referred to. Among other things the mayor was authorized to raise the mortgage existing in favor of the City, on the property of the Treasurer in order to facilitate him in selling it to pay the deficit.

Such is the substance of the settlement and agreement, which the endorsers allege was founded and executed in error. They were the securities on the bond for 1829; and supposing the bond valid, a question which we shall examine hereafter in another part of the case, does the record furnish us evidence to show, that the notes were given in error and consequently void?

It is not every error, that will invalidate a contract; it must be in some point, which was a principal cause for making it, either as to the motive for making it, the person with whom it is made, or the subject matter of the contract itself. The principal cause is the motive or consideration, without which the contract would not have been made, the real existence

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It is not every error that will invalidate a contract. The error must be in some material point, such as in the motive or consideration, the person with whom it is made, or in the subject matter of the contract.

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Considered as mere endorsers, there is nothing showing why the defendants endorsed the notes in question, and as between the holders and endorsers a plea that they endorsed without consideration would not avail them.

of which is a condition precedent, without which the consent would not have been given. These are the principles established by the Code on this subject, and by which this contract must be tested.

Considered as mere endorsers it is impossible to ascertain why the defendants endorsed the notes in question, and indeed as between the holder and endorsers a plea, that they endorsed without consideration would not avail the latter. But place them in a more favorable light, and allow them the right of pleading every exception which the principal might do in avoidance of the contract and what are the facts. They appear already liable for the deficit occasioned by the infidelity of Guérin, as securities for Blache. If there was a real deficit, their previous liability was a sufficient consideration. But the contract was favorable to them, it gave a long delay, it enabled the treasurer to sell off his property in order to meet the demand, it prevented an immediate recourse against them on the bond. It is contended that they supposed this the only deficit, and were therefore induced to come into the agreement. If by this is meant, that if they had known the deficit to be greater, they would not have consented to the arrangement, such an assertion contradicts the agreement itself, by which they stipulate that this bond should continue in force till the end of the year, when alone the full extent of their liability could be ascertained. It is further said that the defalcation occasioned by Guérin was not so great as was represented and there was error in this. It is however certain that the deficit in the treasury was much greater at that time, and how much was caused by Guérin, the treasurer had the best, if not the only means of ascertaining. The evidence before us shows, that the greater part of the sum for which the notes were given was lost by the misconduct of Guérin. The treasurer himself does not allege error in this settlement, and if he did, it could not avail him, because whether the loss was caused by Guérin or not, he was accountable for the real deficit on the books of the treasury.

If the original bond was valid, we are of opinion that the

plea of error cannot be sustained in relation to the note sued on. EASTERN DIS.
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In the other case, No. 9315, the plaintiffs allege that C. L. Blache was annually elected treasurer of the city from 1823 to 1829 both inclusive, and for the faithful performance of his duties gave bond with two sureties in the sum of twenty thousand dollars. That for the three first years Joseph Le Carpentier was surety *in solido* with Nicolas Lesconflair. For the year 1826, he bound himself *in solido* with Joseph Jardela, and for the years 1827, 1828, and 1829, with Martin Blache as co-surety. They allege that the treasurer did not faithfully discharge his duties, but that there is a deficit in his accounts of moneys not accounted for, or which through gross negligence he failed to collect, amounting to forty-four thousand seven hundred and nine, teen dollars. They pray judgment against the treasurer for that amount; against Joseph Le Carpentier *in solido* for the same sum as found for each and every year, against Lesconflair for the alleged deficit of the three first years *in solido*, of twenty thousand five hundred and eighty-three dollars and three cents; and against Martin Blache for twenty-four thousand one hundred thirty-five dollars and ninety-seven cents *in solido*, with C. L. Blache and Le Carpentier for the three last years. The treasurer is charged with gross negligence and fraud.

The answers of the sureties are separate, and present various grounds of defence, which we shall proceed to examine separately in relation to each of the defendants, beginning with that of Nicolas Lesconflair for the years 1823, '24 and '25.

Among other things not necessary to mention now, this respondent says that the plaintiffs cannot recover of him as the surety of Blache, without subrogating him in the rights, actions and mortgages, which they had against the treasurer, in virtue of the bonds signed by him as security. That by the law in force at that time, the city had a legal mortgage on the estate of the treasurer, which, by the acts of the plaintiffs, has since been released, and the treasurer permit-

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The surety is discharged when by the act of the creditor the subrogation of his rights, privileges and mortgages, can no longer be operated in favor of the surety.

ted to sell this property so mortgaged; and it is no longer in their power to subrogate him on his paying the debt.

The surety, says the Code, is discharged when by the act of the creditor the subrogation of his rights, mortgages and privileges, can no longer be operated in favor of the surety.

La. Code, art. 3030.

By the Civil Code in force when the three first bonds were executed, the city had a tacit mortgage on all the real estate of the treasurer. *Old Code, p. 457, art. 25.* If, therefore, it be shown that the plaintiffs, by their acts, without the consent of this defendant, have put it out of their power to enforce the mortgage, and consequently that it could not, either by legal or express subrogation, inure to the benefit of the surety on his paying the bond, it follows that the defendant Lesconflair is discharged.

It is shown by a resolution of the city council, on the 7th of October, 1829, that the mayor was authorised to cancel the mortgage which the corporation had on a lot of ground belonging to the treasurer, in the faubourg Marigny, and on his undivided half of another lot, held in common with Jean Guerin, in order to facilitate him in making sale of his property to pay a deficit in his accounts, as treasurer for that year. The property was afterwards sold with the consent of the corporation, and the mortgage cancelled by the mayor. It is not contended that Lesconflair consented to this arrangement, and it is clear that if he was now to pay the alleged deficit for the years for which he was security, it would not be in the power of the corporation to enable him to enforce the mortgage, in order to reimburse himself. The court therefore considers him as released from all liability.

Joseph Le Carpentier the co-surety of Lesconflair, pleads, among other things which we shall notice hereafter in connexion with the defence of Martin Blache, that he is released from all liability on the bonds for 1823, '24 and '25, because the mayor, by an act before a notary on the 13th of May, 1826, gave a full discharge to Lesconflair, who was bound *in solido* with him. The mayor, in that act, refers to a resolution of the city council of the 25th of April, 1826,

Where the corporation of New-Orleans released a mortgage in their favor on certain property of the city treasurer; held, that the surety is discharged thereby.

as his authority. That resolution is as follows: "On motion of Mr. Marigny, resolved that the council accepts as sureties of Mr. C. L. Blache, treasurer of the city, Messrs. Joseph Le Carpentier and Joseph Jardela."

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That resolution only authorised the mayor to accept Jardela as surety for the year 1826 in lieu of Lesconflair who had been so previously. It did not authorise the mayor to release Lesconflair from his previous liabilities, nor does it appear that the city council ever approved the accounts of the treasurer for the year 1825. There is in the record the report of a committee charged to examine an account of receipts and expenditures for the first six months of that year, that they found the account exact and correct. But it does not appear, that even that report was adopted by the council, much less was there any verification of his accounts or of the state of the treasury, at the end of the fiscal year ending in March 1826. The charter does not authorise the Mayor alone to bind the Corporation by contracts.

But he contends further that he is discharged in consequence of the release of the mortgage on the property of the treasurer above spoken of, by which his co-surety was exonerated. That if his co-surety *in solido* is released, no recovery can be had against him. To this it may be answered, *volenti non fit injuria*. Le Carpentier assented to that release of mortgages, and the sale of the property of the treasurer, he was the agent of the parties in making the sales as auctioneer, the transaction turned to his advantage, was intended for his relief as surety for the year 1829 when it took place, it was one of the conditions upon which he signed the notes on account of the deficit of Guerin.

But where a co-surety is present and consents to the release of a mortgage on the property of the principal debtor, and that it be sold and applied to the payment of a deficit for which he is bound in a surety bond, he is not thereby released, although his co-surety not consenting and bound *in solido* with him, is released.

We proceed to examine the most important ground of defence set up by J. Le Carpentier and Martin Blache in relation to the validity of the three last bonds subscribed by them as sureties for the years 1827, '28 and '29. They allege that these bonds were signed by them in error and that they were induced to give their consent by the conduct of the corporation in annually approving the accounts rendered by the treasurer and re-electing him. That the gross

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negligence of the plaintiffs amount to fraud, (*dol.*) which invalidates the contract, that they were ignorant of any previous deficit, and were authorised by the conduct of the plaintiffs, to believe that none existed, and that without that belief, they would not have subscribed the bonds, and that their consent thus procured by false representations is not binding on them.

The facts in relation to the rendition of accounts and of their approval, are the following. On the 15th of February, the city council resolved, that the account rendered by the treasurer for the years 1821 and '22, up to the last of April, be approved, and the treasurer be requested to publish it. On the 11th of May, 1824, it was resolved, that the account of receipts and expenditures rendered by the city treasurer for the year 1823, be approved; and the treasurer be requested to publish it with an alteration, so as to show, whether the balance in favor of the city at that time, of ninety-four thousand four hundred and thirty-two dollars and twenty-four cents, was in cash, or in notes. On the 6th of March, 1825, the chairman of the committee of finance, submitted to the council, the account rendered by the treasurer for the year 1824, and having reported that the committee had examined it and found it correct, it was approved by the council, and they authorised its publication. On the 20th of August 1825, the chairman of the committee of finance, reported that they had examined the account rendered for the six months ending, June 30th, and found it exact and correct. No resolution was taken on this report. This appears to have been the last account ever rendered. Nor does it appear that the real state of the treasury was ever inquired into previously to 1829. No inquiry was ever made whether the treasurer had faithfully administered, and whether the balances exhibited by his accounts were really on hand.

By the 3d section of an act, supplementary to the several acts concerning the city and corporation of New Orleans, approved March 14th, 1820, it is declared that it shall be the duty of the mayor and council, to cause the treasurer of the corporation to publish on the first Monday of March in each year, an accurate, detailed and just statement of the receipts and

expenditures and condition of the treasury, of said body politic, and publish the same in at least two of the Gazettes printed in New Orleans; the said statement before it is printed, shall be carried by the treasurer aforesaid before some judge or justice of the peace, before whom he shall testify on oath, that the same is a faithful and correct statement. Section 9th, should the treasurer of the said corporation, refuse to account as directed by this act, he shall pay a fine of two thousand dollars. Said fine to be recovered on motion before the District Court by the attorney general or his assistant, ten days notice of which shall be given to the said treasurer, and it is hereby made the duty of the attorney general, to inquire and see that the provisions of this act are faithfully fulfilled, and proceed as the case may require. The rules of proceeding in the city council provide for the appointment of a standing committee of ways and means, among whose duties is, that of examining and verifying the accounts of the treasurer.

But the annual publication of the detailed account of receipts and expenditures, for the information of the citizens, forms but a small part of the duties of the treasurer. It is made his duty by law "to receive and pay all monies belonging to said corporation, to keep regular accounts of their real and personal property, to collect the rents, dues and demands, belonging thereto, once in every year, at such time as shall be directed by the said mayor and city council; to publish an account of the receipts and expenditures of the said treasury, provided that no payments be made by the said treasurer, unless the same be authorised by a warrant drawn by the persons exercising the functions of mayor, in pursuance of an order of the city council."

We derive but little aid on this question from adjudicated cases. Two cases have been cited by the plaintiffs' counsel, decided by the Supreme Court of the United States; those of the *United States vs. Kirkpatrick*, 9 Wheaton, 720, and the *United States vs. Vanzandt*, 11 Wheaton, 188. The first was an action against sureties on a collector's bond. It is the duty of the comptroller of the treasury to call collectors to

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The laws of the
United States re-
quiring the ac-
counting officer
to examine and
settle the ac-

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 counts of their
 debtors at stated
 periods, is direc-
 tory, and consti-
 tutes no part of
 the contract with
 the sureties; and
 a failure to call
 them to an ac-
 count does not
 discharge the
 sureties.

an account quarterly, and in case of failure to account, and to issue a warrant of distress against the delinquent; and the question was, whether the neglect of the comptroller to call the collector to an account periodically, according to law and the consequent injury to the sureties, released them from their liability, on the ground of laches. The court say, "it is said the laws required that settlements should be made at short and stated periods, and the sureties have a right to look to this as their security. But these provisions of the law are enacted by the government for its own security and protection, and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the surety." In the second case, which was against the sureties of a paymaster, the same principle was re-affirmed.

It is apparent that the question in those cases was as to the effect of negligence on the part of public officers upon an existing contract. Those cases and the one now under consideration would be analagous, if the treasurer had been elected to continue in office during the pleasure of the corporation, with an obligation to render an account annually, and the defendants had been sureties for the whole term. But the question here is not as to an existing contract, but what effect shall be given to the repeated omissions and neglect of the mayor and city council, as relates to a new contract about to be entered into; and the question seems to be narrowed down to this, shall it be considered as a condition precedent implied in this new contract, that the corporation had complied with the law in strictly calling the treasurer to an account under a preceding one. If, in relation to a contract already entered into, it was considered by the Supreme Court of the United States, that the obligation to call the officer to an account according to law, did not form a tacit condition of the contract itself, it is not easy to perceive how we are to declare, that as to a new contract, it formed a substantive stipulation or condition, that under a previous one the treasurer had been regularly called to render his accounts, and that he was not a defaulter. If a

When the city treasurer is re-elected, his new bond is for a new contract, and the sureties who sign it cannot avail themselves of a neglect of duty to call the treasurer to account for defalcations of the past year.

new treasurer had been elected, and new sureties had been offered, could they have set up such a defence as to the treasurer of the preceding years?

The treasurer of 1827 must be regarded as totally distinct from that of 1828, although the same man was elected. The obligations of the sureties is expressly limited to the year. But it is said here is an error, created by the conduct of the plaintiffs; the argument is that if the sureties had known that the treasurer was in arrears for the preceding years, they would not have signed the contract; that their ignorance was owing to the gross negligence of the mayor and city council, and that this gross negligence is equivalent to fraud, (*dol*), which vitiates all contracts.

"Fraud," says the Code, "as applied to contracts, is the cause of an error, bearing on a material part of the contract, or continued by artifice with design to obtain some unjust advantage to the one party, or loss to the other." *Civil Code*, art. 1841.

This error must be on some material part of the contract, and the artifice or manœuvre must be designed to obtain an unjust advantage. The maxim that gross negligence is equal to fraud, will not supply the want of proof, that the conduct or acts by which the sureties were deceived, was done with intent to deceive them in relation to this contract. That the maxim might perhaps be invoked to prove the members of the city council and the mayor personally liable to the city corporation for any loss sustained in consequence of their palpable neglect of duty, but we cannot see its bearing on the contract in question in the absence of all proof to show design, nor can we perceive how it forms a material part of this new contract, that a former one had or had not been complied with. *Merlin's Rep. verbo dol, sect. 1.*

It is not pretended that these bonds are not valid as to the principal obligor, and the sureties having acceded to a valid obligation, cannot avoid the responsibility incurred without showing that they were deceived, and induced to enter into the contract by devices practised on them with that intention. These principles seem to us applicable with great force to

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Where an obligation is valid as to the principal obligor, the sureties cannot avoid responsibilities incurred under it without showing they are deceived, and induced to sign it by devices intentionally practised on them.

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contracts of suretyship. Such are supposed to be the intimate and confidential relations existing between the principal and surety, that it is not easy to show what may have been the inducement for entering into such an engagement.

The principal defendant has urged a variety of matters in his defence, which we shall now proceed to notice.

I. He contends that most of the defalcations charged against him are attributable to the misconduct of a book-keeper, whom he was compelled to employ by a resolution of the city council, and who was paid by the corporation. That the false entries in the books are in his hand writing, and that the corporation is accountable for his conduct. It is true, the treasurer was authorised by a resolution of the city council to employ a book-keeper, but the selection of a person so to be employed was left to himself. If his confidence was betrayed, if instead of making him merely a book-keeper, the treasurer put it in his power to withdraw money from the treasury without the warrant of the mayor, and to disguise his peculations by false entries and fraudulent accounts rendered to the city council, it is clear that instead of a mere book-keeper, he became the confidential agent of the defendant, and that the latter is liable to the corporation for his misconduct.

If the city treasurer, under a resolution of the city council, employs a book-keeper, and puts it in his power to withdraw money from the treasury without the warrant of the mayor, and disguise his peculations by false entries and fraudulent accounts, instead of being a mere book-keeper, he becomes the confidential agent of the treasurer, who is liable for his misconduct.

II. It is further alleged that the city council improperly interfered in the manner of keeping the treasury accounts, and thereby created such confusion and embarrassment in the books, that the treasurer appears to have received large sums, which in fact never came into his hands. By a resolution of the 27th of April, 1822, the treasurer was directed to keep the following books, viz. a cash book, a journal, a grand livre, a book for bills payable and receivable, a book for taxes and one for rents. The method of keeping the books according to this ordinance, does not appear to us difficult to comprehend, and in relation to the cash book, nothing is more simple; he is directed to debit himself with all sums received, and credit himself with all sums paid by him, and strike a balance every month.

III. It is further contended that the mayor had been entrusted with funds belonging to the corporation, and that he ought first to be called on to render his account. It appears that the mayor, on various occasions, was authorised by the city council to procure the discount of notes at the different banks for the corporation. His authority extended no further, and the court cannot presume that he acted beyond his powers. But it is shown by positive evidence, that most of the money procured in this way, was paid over to the treasurer, and by very strong presumptions, that the whole was.

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The total amount of deficit, as relates to the principal defendant, is forty-four thousand four hundred thirty-seven dollars and eighty-eight cents, independently of that occasioned by the infidelity of Guerin.

The responsibility of Joseph Le Carpentier commenced on the 4th of April, 1823; he must be credited in the above account with a charge for taxes in 1822, amounting to six hundred sixteen dollars and ninety cents, and one hundred thirty-five dollars and sixty cents in cash, deficit for 1822 and '23, and eight dollars charged in November, 1822, in all, seven hundred sixty dollars and fifty cents, leaving a balance of forty-three thousand six hundred seventy-seven dollars and thirty eight cents. The deficit of 1829, greatly exceeded the amount of the bond, and the defendants, Le Carpentier and Blache, having already arranged *in solido* with their principal for upwards of fourteen thousand dollars, although nominally as endorsers, yet we think it was not the intention of the parties that the legal liability of the sureties for that year should exceed twenty thousand dollars. The excess of the deficit should therefore be deducted from the above sum, which will leave a balance against the defendant Le Carpentier of thirty thousand nine hundred twenty dollars and twenty-eight cents. The liability of Martin Blache for the years 1827, '28 and '29, upon the same principles, appears by the evidence, to amount to seven thousand seven hundred fourteen dollars and thirty-three cents.

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We have reached these results after the most minute and critical examination of the evidence, and the most anxious consideration of the questions of law involved in these cases. It may not be misplaced to state here, that we have detected no evidence of intentional fraud or speculation on the part of the treasurer, personally. He appears before us rather as the victim of a too liberal confidence abused and betrayed; and of that looseness in conducting the business of his department, which is not incompatible with the purest personal integrity.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and proceeding to render such judgment as in the opinion of this court ought to have been given below: it is further ordered, adjudged and decreed, that the plaintiffs recover in the case, No. 9118, of the defendants C. L. Blache, Joseph Le Carpentier and Martin Blache, *in solido*, the sum of three thousand one hundred and twenty-seven dollars and twenty-six cents, with interest at five per cent from judicial demand and costs of protest and of this suit in both courts.

And it is further ordered, adjudged and decreed, that the plaintiffs recover of the defendant Charles Louis Blache in the case, No. 9315, the sum of forty-four thousand four hundred and thirty-seven dollars and eighty-eight cents; of Joseph Le Carpentier *in solido* with said C. L. Blache, the sum of thirty thousand nine hundred and twenty dollars and twenty-eight cents; and of Martin Blache *in solido* with the said C. L. Blache and Joseph Le Carpentier, the sum of seven thousand seven hundred and fourteen dollars and thirty-three cents, and that there be judgment in favor of Nicolas Lesconfair: and it is further ordered, that the said defendants, except Lesconfair, pay the costs of both courts.

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WILSON, CURATOR, &c., vs. PROCTOR.

WILSON, EX'R.
vs.
PROCTOR.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a person is sued on an obligation and admits it, but pleads a deduction of the price of the object for which it was given, and fails to produce any evidence in support of his plea, and appeals, the appeal will be considered as taken for delay, and the judgment will be affirmed against him, with ten per cent. damages, and costs.

The plaintiff, as curator of the vacant estate of James Duffy, deceased, caused a certain slave belonging to said estate, to be sold at probate sale, at which the defendant became the purchaser, and gave his check on the Mechanics' and Traders' Bank for four hundred and eighty dollars, in part payment of the price. Afterwards, and before the check was presented, he went to the bank and countermanded payment. The plaintiff, in his capacity of curator, &c., instituted suit on the check against Proctor for its amount, with interest, and costs of protest.

Proctor, in his answer, admitted that he gave the check for the object stated in the plaintiff's petition, and countermanded the payment of it at the bank. He alleges that the slave was not such as had been represented, and that he was afflicted with a redhibitory disease in the neck, by which his value was greatly diminished, and for which he claims a deduction of three hundred dollars, from the original price, and sets it up in his answer as a reconventional demand.

On the trial no evidence was adduced by the defendant in support of his plea and demand, and the district judge rendered judgment in favor of the plaintiff for the amount of the check, costs of protest and interest, &c.

The defendant appealed.

On the appeal, the plaintiff and appellee prayed the affirmance of his judgment, with ten per cent. damages, as a frivolous appeal.

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MARTIN, J., delivered the opinion of the court.

The defendant was sued on a check which he had given to the plaintiff, and which had been protested. On the refusal of payment by the bank, he admitted that he gave the check in part payment of the price of a slave, sold him by the plaintiff, as stated in the petition; but that since the purchase, he had discovered a redhibitory vice in the slave.

There was judgement for the plaintiff, and the defendant appealed.

It does not appear that the defendant adduced a tittle of evidence in support of his allegations. The answer admits that he gave the check, and that it was by his directions that payment was refused at the bank.

It is clear that he had no other object but delay in view when he appealed.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with damages at the rate of ten per cent., and that the defendant pay costs in this court.

Buchanan, for the plaintiff and appellee.

Culbertson, for the defendant and appellant.

Where a person is sued on an obligation and admits it, but pleads a deduction of the price of the object for which it was given, and fails to produce any evidence in support of his plea, and appeals, the appeal will be considered as taken for delay, and the judgment will be affirmed against him, with ten per cent. damages and costs.

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May, 1834.HAGAN
vs.
FERRIS.

HAGAN vs. FERRES.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

An appeal will not be dismissed on the ground that the judgment of the inferior court was rendered in favor of a different party plaintiff, from that stated in the petition.

But where both parties pray for a reversal of the judgment, it will be done; as to affirm it, would be granting something to the parties *ultra petitione*.

In sums over five hundred dollars, the testimony of one witness is insufficient to confirm a judgment by default.

In such cases there will be judgment of non-suit for the defendant.

This was a suit brought by John Hagan against Madame Ferris, for a balance due for rent of a house on Canal street. The rent claimed, is contained in an account which is annexed to the petition, and amounts to nine hundred thirty-eight dollars and forty-two cents. He prayed for judgment and an order for a provisional seizure of the furniture of the defendant.

The parish judge granted the order. Elliott filed an opposition to the seizure, alleging that some of the furniture seized belonged to him. This was allowed, and the furniture claimed restored on his executing a bond to abide the final judgment of the court thereon. Judgment was taken against the defendant by default, for the sum claimed in the petition, and made final on the testimony of one witness, the counsel who brought the suit. It was rendered in the name of John Hagan & Co., instead of John Hagan, as claimed in the petition.

The defendant prayed and obtained an appeal.

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vs.
FERRIS.

The answer of John Hagan to the petition of appeal, aver that he sued alone, and the court rendered judgment in favor of John Hagan & Co., who are in no manner interested in the suit. He prays that the appeal be dismissed at the appellant's cost; or that judgment be reversed, and the cause ordered to proceed in the name of *John Hagan* alone.

Macready, for the plaintiff and appellee.

McMillen and *Elliott*, for the defendant and appellant, contended:

1. That the judgment must be reversed, because there is no legal proof of the plaintiff's claim.

2. In all claims over five hundred dollars, the testimony of one witness is insufficient to establish them. *La. Code*, 2257.

3. This judgment was rendered on the sole testimony of one witness, and must be reversed, and judgment of nonsuit entered for the defendant.

MARTIN, J., delivered the opinion of the court.

The plaintiff and appellant has prayed the dismissal of the appeal, on the ground that by his petition it appears that he sues for himself personally, and the judgment is rendered in favor of John Hagan & Co., who are in no manner interested in the suit; and he has added a prayer, that if the appeal be not dismissed the judgment may be reversed, and the case sent back for further proceedings.

An appeal will not be dismissed on the ground that the judgment of the inferior court was rendered in favor of a different party, plaintiff, from that stated in the petition.

But where both parties pray for

It appears to us that the appeal ought not to be dismissed on the ground relied on. If the first court erred in giving judgment to the injury of the plaintiff and appellee, the law has pointed out a mode by which he may be relieved in this court.

As he has prayed for the reversal of the judgment, and

the defendant and appellant has joined in this prayer, we must reverse it; as to affirm it, would be to grant to the plaintiffs and appellants something *ultra petitione*.

He has not prayed us to amend it, but to remand the case; but he has not urged any thing which authorises our acceding to his request.

The defendant and appellant has prayed our judgment in his favor. We have carefully looked over the record, and it does not appear to us that the plaintiff has made out his case by proof.

It is, therefore, ordered, adjudged and decreed, that there be judgment for the defendant and appellant, as in case of non-suit; the plaintiff and appellee paying the costs in both courts.

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the reversal of a judgment, it will be done; as to affirm it, would be granting something *ultra petitione*.

In sums over five hundred dollars, the testimony of one witness is insufficient to confirm a judgment by default.

In such cases, there will be judgment of non-suit for the defendant.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A partner is a competent witness for his co-partner in suit for the recovery of the price of work which was done before the partnership was formed, and when he has no interest in the result of the suit.

The objection to a partner as a witness for his co-partner in a matter which took place before the existence of the partnership, goes to his credibility and not to his competency.

In a case where there is much testimony introduced on both sides and a motion for a new trial, although the judgment of the District Court appears clearly correct, the Supreme Court will not, in such a case, affirm it with damages for a frivolous appeal.

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The plaintiff instituted his suit to recover the sum of five hundred and sixty eight dollars and sixty-four cents, for work and labor done and materials furnished for the use and benefit of the defendant, and at his request. It consisted of copper and zinc materials furnished and put on a certain building of the defendant, all of which is detailed in an account annexed to the petition.

The defendant plead a general denial, and admitted that the plaintiff undertook the work which was to cover a house, but did it so badly and in such an unworkmanlike manner, that the materials furnished by defendant were almost destroyed, by which he sustained a loss of four hundred and seventy-seven dollars and sixty-two cents of their value, and that he has suffered damages in consequence of the unfaithful manner the work was done to the amount of five hundred dollars, which sums he annexed to his answer, and pleads them in compensation and reconvention against the plaintiff's demand.

There were a number of witnesses examined on both sides, touching the manner in which the zinc was put on as a covering or roof of the defendant's house. It was admitted that the plaintiff was a good workman in copper, and that the workmanship of this roof is of excellent quality independently of the mode of fastening on the zinc. That if the material had been copper or tin, the mode followed by the plaintiff is the right one. The district judge considered it a kind of experiment which was to be made at the risk and expense of the defendant, and that the plaintiff was entitled to the amount of his account which was proved to be reasonable for the work done and materials furnished. Judgment was given accordingly, and the defendant appealed.

MARTIN, J. delivered the opinion of the court.

The plaintiff's claim for work and labor done in covering the defendant's house with zinc, is resisted on the ground of the work having been done in so bad and unworkmanlike

manner that the roof leaked so much as to render the house absolutely useless. The allegation of the defendant is repelled and the leakage is attributed to the badness of the materials furnished by the defendant, who is appellant from the judgment rendered against him.

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As is usual in a case like the present, each party has brought a number of witnesses to support his allegations. Those of the plaintiff say he remonstrated with the defendant on the badness of the zinc, and those of the defendant, that he remonstrated with the plaintiff while the work was going on, on the bad method which had been adopted in laying on the sheets of zinc.

After the testimony had been taken down, the defendant's counsel insisted on the testimony of a witness being stricken out on account of his being a partner of the plaintiff, who had introduced him; this was opposed on the score that the connexion alleged to exist between the witness and the party did not extend to the particular undertaking which was the object of contestation. The District Court, in our opinion correctly, held that the objection, if any there was, went to the credibility but not to the competency of the witness.

A partner is a competent witness for his co-partner in a suit for the recovery of the price of work which was done before the partnership was formed, and when he has no interest in the result of the suit.

The objection to a partner as a witness for his co-partner in a matter which took place before the existence of the partnership goes to his credibility and not to his competency.

On the merits, a close examination of the declarations of the witnesses has led us to the conclusion, that the judge did not err in that to which he came.

In a case where there is much testimony introduced on both sides and a motion for a new trial; altho the judgment of the District Court appears clearly correct, the Supreme Court will not, in such a case affirm it with damages as for a frivolous appeal.

The plaintiff has claimed damages for a frivolous appeal; but it has not appeared to us that the case is one which calls for them.

It is, therefore, ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

L. C. Duncan, for the plaintiff.

Sterrett, contra.

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APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW ORLEANS.

In acts of sale and conveyance of immoveable property, the sale is not complete until all the parties sign the act; and until *all* have signed, those that first signed may recede.

But in a contract of sale signed by the vendor and vendee, in which the price and terms of payment are settled, the stipulation that a third person named in the act, will release a certain mortgage, is a stipulation in favor of the purchaser, is collateral to the contract; and the sale does not depend on that condition, and is valid without the signature of such third person.

The voluntary execution of a contract, carries with it a renunciation of all exceptions which the party executing might have set up against it in relation to vices or nullities of form.

A third person named in an act of sale, who stipulates therein to release a mortgage on the property sold, may be called as a witness by the vendee to prove that he had released the mortgage as stipulated, although he never signed the act containing this stipulation.

A sale made to one *not a creditor*, by an insolvent or absconding debtor, even within the three months preceding his failure, is not presumed to be fraudulent, and in an action to annul it, the burthen of proof is on the party attacking the contract.

The 5th section of the act creating the office of register of conveyances, requiring all acts of transfer of immovable property and slaves, whether passed before a notary or otherwise, to be registered, or to have no effect against third persons but from the day of registry, does not apply to purchasers *without notice*; and operates in favor of such creditors of the vendor as have a *recorded* judgment, or an attachment *levied* before registry.

The registry of an act of sale in the office of the register of conveyances, before any proceedings are had against the purchaser, or notice to him of the claims of the creditors of the vendor, renders the sale valid, although not made until after a sequestration issues against the property.

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A sequestration is a judicial deposit, and is essentially a conservatory act, which does not divest the title of the owner, and gives the creditor no greater right than he had before.

This suit is brought by the syndic of the creditors of Francis McManus, an absconding debtor, to annul two acts of sale made by McManus to the defendant, of three lots of ground in New-Orleans, when on the eve of bankruptcy.

The petition charges that McManus conveyed to John Jewett, of the city of New York, a lot of ground on Commerce street, by a public act, dated the 13th of February, 1833, and also two other lots by notarial act, dated the 30th of January, 1833; copies of which acts are annexed to the petition. That the sale of the 13th of February is not valid, because it was not completed by the signatures of all the parties, nor recorded in the office of the register of conveyances until after McManus had absconded; that the act of the 30th of January, 1833, was never registered, and can have no effect against the creditors of McManus. The transfer of these lots by the said acts is alleged to be voidable as to the creditors of McManus, for the following reasons: 1st., Because they were made by McManus, when he was insolvent, to the knowledge of the defendant, and for the purpose of defrauding his creditors. 2d., Because the said sales and transfers were made without any consideration being paid by the defendant. The plaintiff prays that Jewett be cited by his agent residing in New-Orleans, and that an attachment issue against said property, and an attorney be appointed to defend; and that he may have judgment annulling said sales, and decreeing the lots in question to be the property of the creditors of McManus.

The defendant denies generally the plaintiff's demand, and that he has no right or title to the property, as claimed

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Welthersby, testified that McManus absconded and left his store on the 14th of February, 1833.

The statement of facts in the record shows that the creditors of McManus filed their petition against him as an absconding debtor and obtained an order of sequestration of the lots in question, and for a meeting of his creditors on the 16th of February, 1833; and the next day provisional syndics were appointed.

The sheriff returned the writ of sequestration as having been executed the day it issued, but the property was afterwards appraised. No notice appears to have been given to the defendant of these proceedings.

The certificate of the register of conveyances showed that the act of sale of the 13th February, 1833, was registered in his office on the 18th of February, two days after the sequestration; and the act of January 30th, 1833, was registered February 4th, 1833. The act of February 13th, contained the following clause and stipulation, viz: "McManus declares he has disposed of his stock in the bank of Louisiana to D. F. Burthe, who has obligated himself to cause the mortgage on said lots in favor of the bank, to be cancelled; and for better certainty, the said D. F. Burthe hereby declares and obligates himself to cause said mortgage to be cancelled in sixty days from the date hereof." The vendor and vendee signed the act, but Burthe omitted to sign.

On the trial, the defendant's counsel offered to prove by Burthe that he was a party to said act, and that the stipulation therein contained on his part had been complied with, and the mortgage cancelled. The plaintiff's counsel objected to his being sworn as a witness, on the ground that *parol* evidence could not be received to supercede the necessity of the signatures of all the parties to the act. The court sustained the objection, and refused to suffer the testimony to go to the jury, because it did not go to contradict the allegation in the plaintiff's petition, that the notarial act had not

been signed by Mr. Burthe. A bill of exception was taken to the opinion of the court. EASTERN DIST.
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The judge, in his charge to the jury, stated that the first sale was attacked on the ground of nullity. 1st, That Burthe omitted to sign the acts. 2d, That no delivery took place. 3d, That the sale was made within three months of McManus' failure. 4th, That the act was not recorded in the office of the register of conveyances, until two days after the sequestration issued.

The second sale is attacked: 1st, As to one of the lots, the deed was not recorded, it being recorded only for the lot in Appollo street. 2d, In relation to both lots, the sale took place within three months of the insolvency. 3d, In relation to Burthe's omitting to sign, he charged "that every party mentioned in a contract must sign it, or otherwise all the other parties who have signed may recede."

There was a verdict in favor of the plaintiff, and judgment rendered thereon, annulling the two sales of the lots in contest, and decreeing them to be the property of the creditors of McManus.

The defendant appealed.

Preston, for the plaintiff and appellee, made the following points:

1. The sales of McManus to the defendant are null, because the sale of two of the lots was not registered in the office of the register of conveyances, so as to have effect against third persons.

2. The creditors of McManus are third parties, as respects the sales from him to the defendant. *La. Code*, 2522. *Pothier on Obligations*, no. 750. *Merlin's questions de droit*, verbo *Tiers*, sec. 2, vol. 16.

3. The decision in the case of *Doubrere vs. Guellier's syndic*, 2 *Martin*, N. S. 174, was made under the provisions of the old Civil Code, which said such sales "shall have

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EASTERN DIS. effect to the *prejudice* of persons not parties to the act only,
May, 1834. &c." The expressions in the new Code on this subject, are
 SYNDIC OF unequivocal, and do not sustain that decision. *La. Code,*
 M'MANUS 2242, 2417.
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4. Two legal presumptions of fraud or simulation are raised against these sales: First, Because they were made but a short time before the failure of McManus. Second, Because no delivery to the vendee took place.

5. All sales of insolvent debtors' property made within three months before failure are null, unless the purchaser shows that they were made for a just consideration, and delivered *bona fide* at the time. 2 *Moreau's Digest*, 431, sec. 24.

6. Where no delivery of property sold takes place, fraud is presumed. *La. Code*, 2456. So if the vendor remains in possession under a precarious title. 4 *La. Reports*, 339.

7. The act to which Burthe is a party, is not complete for want of his signature. 3 *Martin*, 349. 8 *Toullier*, 159, no. 102, 183, et seq. *Merlin's Reports and Questions de Droit. Vero Signature.*

8. The creditors have rights which the parties to these sales have not and cannot have, because the law gives them their remedy under a forced surrender. *La Code*, 1969.

9. The creditors do not loose their right to this property, because the transfer as to them is null, not having been recorded in the office of the register of conveyances.

10. An attaching creditor can only attach the rights of his debtor; but in the case of *Williams vs. Hagan et al.*, the creditors obtained rights which the debtor could not claim. 2 *La. Reports*, 122.

11. The registry of the acts of sale could not take place after the sequestration issued. The sheriff had the keys, and was ordered to sequester all the property in question.

12. The whole transactions in relation to these sales, were fraudulent. The jury, no doubt, so considered them, and their verdict ought not to be disturbed.

Hoffman and Sterrett, for the defendant and appellant, EASTERN DIS. May, 1834.
contended that:

1. This being a trial by jury, and the opinion of the court on the question of law arising therein, being manifestly erroneous, the judgement must be reversed and the cause remanded for a new trial.

2. The sale was complete and binding without the signature of Mr. Burthe, he being neither vendor nor vendee. His acceptance could be shown by proof of acceptance. *Vide 3 N. S. 584. 2 La. Reports, 461.*

3. The court erred in the opinion that the proceedings had by the creditors of McManus, after his departure, was evidence of his insolvency at the time he left. Could it be said that a person who removes from the state, taking with him the mass of his property, was insolvent, because he left property less than the amount of his debts? In this case there is strong circumstantial evidence that Mr. McManus carried off more than was sufficient to pay his debts. *Civil Code, art. 1980, and 3522, no. 15.*

4. The plaintiff has failed to make out his allegation that McManus was insolvent in 1832, or at any time before his departure. His departure is not conclusive proof of that fact.

5. The charge of the court to the jury was erroneous *in toto*. The evidence does not in the least justify the belief that the defendant knew that McManus was insolvent, for no one else supposed it. The testimony, taken together, leaves the impression on the mind that he was not insolvent. If not insolvent, then the principles invoked by the plaintiff's attorney and by the court, have no application. The registry of the sale cannot be inquired into, for the creditors are not third persons with regard to a contract or judgment. *Vide 2 Martin, N. S. 175.*

BULLARD, J., delivered the opinion of the court.

The plaintiff as syndic of the creditors of McManus seeks to avoid two sales of town lots made by the insolvent on the eve

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of his absconding, upon several grounds, which we shall proceed to notice in the order in which they have been argued.

I. The first alleged nullity in one of the acts of sale is that it was not signed by Mr. Burthe. The act recites that there exists on the lot a mortgage in favor of the Union Bank to secure certain stock, but that the stock had been transferred to Mr. Burthe who had engaged to have the mortgage cancelled. It then goes on to say, that for greater certainty Mr. Burthe appeared before the notary and declared that he had purchased the stock and was the only person interested, and consequently engages to cause the mortgages to be released within sixty days, but he did not sign the act. The judge charged the jury, that every party mentioned in a deed must sign, otherwise the other parties may retract, and that the plaintiff representing Mr. McManus, the vendor may retract.

This court has held that until all the parties to an act have signed, the act is not complete and those who have signed may recede. *Villeré et al. vs. Brognier*, 3 *Martin* 326. *Wells vs. Dill*, 1 *N. S.* 592.

The rule is founded on the principle that each party signs on the tacit condition that all the other parties will sign; that until the final assent is given there is no concurrence of different minds and that before that is given any one may retract. But the question in this case is different. The contract is one of sale, both the vendor and purchaser signed with the notary and witnesses. The price and terms of payment are settled in the act. The stipulation that Mr. Burthe should release the mortgage was in favor of the purchaser and only collateral to the principal contract. The sale is not made to depend on that condition and the purchaser does not insist on the stipulation, Mr. Burthe was a stranger to the principal contract and its validity in our opinion as between the vendor and vendee does not depend on his signing the act.

But there is another principle which appears to the court applicable to this case. The voluntary execution of a contract carries with it a renunciation of all exceptions which the party

In acts of sale or conveyance of immovable property the sale is not complete until all the parties sign the act; and until all have signed those that first signed may recede.

But in a contract of sale signed by the vendor and vendee in which the price and terms of payment are settled, the stipulation that a third person named in the act, will release a certain mortgage, is a stipulation in favor of the purchaser, is collateral to the contract and the sale does not depend on that condition and is valid without the signature of such third person.

The voluntary execution of a contract carries with it a renun-

executing might have set up against the act in relation to vices or nullities of form. 8 *Toullier*, No. 140.

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McManus received in presence of the notary a note secured by mortgage on the lot and paraphed by the notary for four thousand dollars as a part of the price. The Bank of Louisiana received the further sum of one thousand dollars according to the conditions of the contract, this is *protanto* an execution of the contract. It seems to us clear that McManus cannot now retract, at least without refunding what has been received, much less his syndics.

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ciation of all exceptions which the party executing might have set up against it in relation to vices or nullities of form.

In connexion with this part of the case we will notice a bill of exceptions in the record. Mr. Burthe was offered as a witness to prove that in point of fact he had released the mortgage as was contemplated by the parties. His testimony was refused on the ground that parole evidence is inadmissible to supercede the necessity of the signatures of all the parties, and that it did not go to contradict the allegation in the petition that the act was not signed, the effect of such want of signature being a question still open for discussion.

If it be true that the voluntary execution of a contract will cure mere vices of form and that assent to a contract may be in some cases shown by evidence *aliundé*, it would seem to follow, that evidence of such execution is admissible. In this case the purchaser who alone had any interest in having the mortgage released offers to prove that it was released. It is true the evidence does not go directly to negative the allegation that Mr. Burthe did not sign the act, but it goes to prove the performance of an act, which renders such a stipulation wholly superfluous. We are of opinion that the court erred in refusing the testimony.

A third person named in an act of sale, who stipulates therein to release a mortgage on the property sold, may be called as a witness by the vendee to prove that he had released the mortgage as stipulated although he never signed the act containing the stipulation.

II. Another ground relied on to annul the sale is that it was made within three months preceding the failure of McManus and is presumed to be fraudulent and that the purchaser must show the fairness of the contract. In support of this position the plaintiff's counsel has cited the act of 1817. The 24th section of that act is in the following words: "Any debtor who shall be convicted of having at any time within the three months next preceding his failure, sold, en-

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gaged, or mortgaged any of his goods and effects or of having otherwise disposed of the same or confessed judgment in order to give an unjust preference to one or more of his creditors over the others, shall be debarred from the benefit of this act and the said deeds or acts shall be declared null and void, provided however, that if the purchaser of said property shall prove that the said property was either sold or engaged to him for a true and just consideration by him *bona fide* delivered at the time of such deed the said sales and mortgages shall be declared valid." 2 Moreau's Digest, 431.

The words "in order to give an unjust preference to one or more of his creditors over the others," appears to us to relate to all the preceding clauses of the sentence. The proviso must therefore apply to the same class of persons.

A sale made to one not a creditor by an insolvent or absconding debtor, even within the three months preceding his failure, is not presumed to be fraudulent, and in an action to annul it the burthen of proof is on the party attacking the contract.

A sale made to one not a creditor even within the three months is not presumed to be fraudulent, and in an action to annul such sale, the burden of proof is on the party attacking the contract. This statute, as the judge very properly remarked to the jury, is to be taken in connexion with the provisions of the Code. Article 1979 declares, that "every contract shall be deemed to have been made in fraud of creditors, when the obligee knew that the obligor was in insolvent circumstances, and when such contract gives to the obligee, if he be a creditor, any advantage over other creditors of the obligor." Other circumstances attending the transaction, such as the vendor retaining possession, may throw the *onus probandi* on the purchaser; but unless it be shown that the purchaser knew of the insolvency, or was a creditor at the time, the legal presumption is in favor of the contract.

III. The plaintiff further contends that the sale of two of the lots is null and can have no effect as to the creditors, because it was not registered in the office of the register of conveyances before the sequestration was sued out. That the creditors of McManus, represented by the syndic, are third persons, and he relies on the 5th section of the act of 1827. 2 Moreau's Digest, 303.

On the other hand it is contended, that the plaintiff is a

third person only in a modified sense; that to a certain extent he represents and is the *ayant cause* of McManus, that the Code has distinguished between creditors individually and the creditors in cases of failure, for whose benefit the ceding debtor has surrendered his property, and that in this latter case the creditors can claim the privilege of third persons only in relation to such contracts as they entered into with the insolvent in ignorance of the rights which he had transferred to another: And he cites the last paragraph of the *Civil Code*, which declares, that "in cases of failure, third persons are *particularly* the creditors of the debtor who contracted with him without knowledge of the rights which he had transferred to another."

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We will not affect to conceal the difficulty we find in giving a construction to this clause. We think ourselves bound to give effect to it if we can ascertain what the legislature intended, and to what extent it meant that the creditors of an insolvent should or should not be bound by his contracts. The general rule is that all who are not parties to a contract or judgment, are third persons; then comes the clause above recited. State the proposition in a different form. The creditors of an insolvent are third persons, particularly when they contracted with him without knowledge of the rights which he had transferred to another. If they are third persons generally, it was wholly unnecessary to say they are in particular. Take the converse of the proposition. Creditors are not third persons; that is to say, are bound by the contracts of their debtor, of which they had knowledge when they became creditors. In that form it would seem to be merely a paraphrase of the old maxim, that he who complains of a fraud must show an interest at the time the alleged fraud was committed. Those who contracted afterwards have no right to complain, except when in ignorance of rights which had been transferred to another. There might be among the creditors of an insolvent some who, according to these principles, could not individually avoid a contract of their debtor, of which they had notice at the date of their debts, and others who might complain of being

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declares, that "no creditor can by the action given by this section sue individually to annul any contract made before the time his debt accrued." On the failure of his debtor, can he acquire any new action or right by being represented in common with the other creditors by a syndic? The judgment in the revocatory action must be, that the contract complained of be annulled as to its effect on the complaining creditors only. By that we understand those who had a right to complain. *Civil Code, art. 1972.* There may be cases then, in which a part of the creditors of an insolvent would have no right to complain; and a part might cause a particular contract to be annulled as respects its effects on them. But the syndic represents them all. If this be the construction of this part of the Code, of which we give no positive opinion, it seems to have no application to the case before the court, because it is hardly possible to conceive that any of the debts of McManus were contracted after the date of his deed to Jewett.

The words of the act of the legislature are positive, that such contracts shall have no effect against third persons, but from the day of their being registered; until then, the contract, though passed before a notary public and two witnesses, has no existence as to third persons.

But may it not be said, that if the creditor is a third person as to the contract of his debtor with a stranger, by which he sells a part of his property, the purchaser is also a third person as to the debt, which being simply chirographic has no date and no existence as to him, without notice." Are they not reciprocally third persons as to each other's contracts? "Les actes sous signature privée, says Pothier, étant sujets à être antédaté ne font ordinairement foi contre les tiers que la chose qu'ils renferment s'est passée, sinon du jour qu'ils sont rapportés et produits au tiers." 2 *Pothier des Ob. No. 715.*

The Code provides that an individual creditor cannot exercise the revocatory action until he has obtained a judgment against his debtor, unless the defendant in such action is also made a party to the action to liquidate the debt. It

would seem an anomaly if a single chirographic creditor could cause to be annulled a sale made by his debtor to a stranger, merely on the ground that the sale is to have no effect as to him, and yet deny to the purchaser the right to urge in his defence the same principle; that he also is a third person without notice in relation to the very debt which forms the basis of his action. If the law requires notice to the creditor or third persons, to give effect to a contract against them, does it not equally require some notice of the debt to give it effect against those who contract with the debtor? Wherever there is a recorded judgment or an attachment levied before the registry, the statute applies.

In the case of *Williams vs. Hagan et al.* the plaintiff had levied an attachment on the slaves before the conveyance to the defendant was registered according to the statute, and this court sustained the attachment, considering the conveyance without effect as to the attaching creditor, and that the property was still as to him the property of his debtor. There was notice to the purchaser, and a species of lien created on the property, but if the creditor had waited until the conveyance was registered, the sale would have had effect against the creditor, unless proved fraudulent. 2 *La. Rep.* 122.

In the case now before the court, the deeds appear to have been registered before any proceedings were had against the purchaser. He was not a party to the proceedings against the absconding debtor, who appears to have been in good credit up to the day of his departure. The question therefore is, whether it was too late to record the deed after the issuing of the sequestration? At what time was the purchaser still at liberty to register his deed, so as to give it effect against third persons, supposing the transaction a fair one, entered into *bona fide* in ignorance of the insolvency, and for a valuable consideration?

The writ of sequestration was issued on the 16th, and executed on the same day, but it does not appear that the lots in question were sequestered, nor had the defendant so far as it appears, any notice of the proceeding. The deed

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The 5th section of the act creating the office of registrar of conveyances, requiring all acts of transfer of immoveable property and slaves, whether passed before a notary or otherwise to be registered, or to have no effect against third persons but from the day of registry, does not apply to purchasers without notice and operates in favor of such creditors of the vendor as have a recorded judgment or an attachment levied before registry.

The registry of an act of sale in the office of the registrar of conveyances before any proceedings are had against the purchaser, or notice to him of the claims of the creditors of the vendor, renders the sale valid, although not made until a sequestration issues against the property.

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A sequestration is a judicial deposit, and is essentially a conservatory act which does not divest the title of the owner, and gives the creditor no greater right than he had before.

was registered on the 18th, and provisional syndics appointed two days afterwards. It is contended that the sequestration is equivalent to an attachment, and that the creditors thereby acquired such a lien as to render the conveyance of no effect. A sequestration is a judicial deposit, and is essentially a conservatory measure. It does not divest the title of the owner, and gives the creditors no greater right than they had before. The purpose of a sequestration in such cases is the safe keeping of the property of the absconding debtor until provisional syndics are appointed to take possession.

The defendant was no party to these proceedings, and to give effect to them against him, would be in violation of the very rule we are called on to enforce. The proceeding on the part of the defendant was undoubtedly suspicious and worthy of consideration by the jury on the question of fraud. All we intend to say is, that if the sale was in other respects *bona fide*, it was perfect as to McManus, and might be registered at the time it was done, so as to give it effect against third persons. The fact that McManus retained possession of the lot under a precarious title, furnishes presumptive evidence of simulation, and in cases of this kind, the purchaser must produce proof that he was acting in good faith, and establish the reality of the sale. *Civil Code, art. 2456.* If the sale was simulated or in fraud of the rights of creditors, it is liable to be annulled notwithstanding the registry. All these questions are left to the decision of a jury as of their peculiar province. But the parties have a right to a fair and impartial trial by jury, uninfluenced by any misconceptions of the law on the part of the court in the hurry of the trial.

Upon the whole, we think the court erred in instructing the jury that one of the deeds was null as to all the parties, because not signed by Mr. Burthe, and that the creditors obtained by the sequestration on the 16th of February, such a lien as is contemplated by the authorities cited by the defendant's counsel; if by that the judge meant to convey the idea that it was too late to register his deed after the sequestration issued, so as to give it effect as to third persons;

and in refusing to permit Mr. Burthe to be sworn to prove the fact that he had released the mortgage referred to in the conveyance.

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Whether the contract was simulated or in fraud of creditors, or void in other respects, must be left to another jury to decide according to the evidence which may be adduced by the parties.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be avoided and reversed, and that the case be remanded for a new trial, with directions to the judge not to refuse any legal evidence that the mortgage mentioned in one of the deeds was released by Mr. Burthe, and to abstain from instructing the jury that the said deed was null as to all parties, and that the plaintiff had a right to retract for McManus, because the act was not signed by Mr. Burthe; and that the sequestration created such a lien in favor of the creditors, as to preclude the defendant from the right of registering his other conveyance, so as to give it effect against third persons; and that the plaintiff pay the costs of the appeal.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The vendor necessarily warrants against his own acts, and even without a stipulation of warranty is liable for a restitution of the price, unless the purchaser was aware at the time of sale of the danger of eviction, and purchased at his peril.

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of sale or written evidence of the contract, and the purchaser has a right to require such a conveyance as will truly show what he bought and the conditions of sale.

Where a lot of land is sold in reference to a plan on which it is designated, the plan is regarded as forming part of the description of the land sold.

So where land is designated on a plan, which of itself refers to titles in the surveyor's office, that will enable the purchaser to run the lines, it is a sufficient description to render the sale binding on him.

A sale at auction is not null because the written instructions of the vendors to the auctioneer are not produced on the trial.

On the first of May, 1833, the Canal Bank, L. Millaudon, Samuel Kohn and John Slidell, caused to be sold at public auction a lot or portion of land, being part of *McCarty's plantation*, adjoining Carrollton, situated at the upper end of the parish of Orleans, and containing seven hundred and seventy-seven acres, which, as alleged in the petition, was adjudicated to Robert Copeland, as the last and highest bidder, for the sum of twenty-six thousand dollars, payable by instalments; the purchaser to have the lines run at his own expense. That at the time of sale, notice was given that the vendors did not warrant either the contents, the quantity or the title to said land, but that they simply conveyed to the purchaser the right, title and interest, which they had to it.

The plaintiffs allege that they have ever been ready to make such title, and that they notified the defendant thereof, who refused to accept and to comply with the terms of the sale. They pray judgment for the first instalment, which is due, and that the defendant be decreed to execute his several promissory notes for the remainder of the price according to the terms of sale.

The defendant's counsel excepted to the petition, on the ground that suit is brought in the name of the bank as one

of the plaintiffs, without naming the president and directors; and that the different *interests* of the plaintiffs in the property are not specified.

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The defendant then filed his answer to the merits, reserving the benefit of his exceptions, denied generally, and admitted that he bid for the land as stated, but declares that the agent of the plaintiffs, at the time of the sale, proclaimed the title to be as good as any in the state, which induced purchasers to believe that the title would be warranted. That the plaintiffs refused to give him a good and valid title, and to designate the courses, distances and boundaries of the land. He admits that an act of sale was offered on the part of the plaintiffs, without warranty, and which did not designate the boundaries of said land. He avers his willingness to comply with the terms of the sale, but that the plaintiffs have failed and refused on their part.

The defendant, in a supplemental answer, propounded interrogatories to the plaintiffs, requiring them to disclose their separate interests in the suit, who of them were present at the sale, what declarations were made touching the validity of the title, and by whom. That the Canal Bank state whether Mr. Livermore, who was a director and counsel, was not present at the sale, and if he did not declare, that as counsel, he had examined the title, and that it would be warranted good; and if he was not authorised to make such declaration by the bank.

The president of the bank answered all the interrogatories, disclosed the amounts of the different interests of the plaintiffs in the suit, denied that any agent of theirs at the sale was authorised to guarantee the title, and admitted that Livermore was a director, counsel of the bank, and one of a committee on the part of the bank to attend said sale; that his instructions were, that the property be sold without guaranty of title, and without warranty of any specific quantity.

Millaudon, Kohn and Slidell, answered separately, disclosing their separate interests in the property sold, and affirm-

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ing the statement of the president of the bank, that the property was sold without warranty of title or quantity.

Isaac L. McCoy, the auctioneer who sold the property in contest, was called and sworn for the plaintiffs. He stated that at the time of sale, the sellers did not guarantee the title or the quantity of the land sold; that the purchasers were to cause the lines of their respective purchases to be run at their own expense, and that the particulars and condition of the sale were announced several times by the witness in a loud voice at the sale; that there were many bidders, and more for the land in question than the other lots then sold. The proces verbal of sale by the auctioneer states that, "the sellers do not guarantee the title nor the quantity of land. Purchasers are to cause the lines of their respective purchases to be run at their own expence, &c." The act of sale tendered to the defendant was also in evidence. It contains a clause to this effect: "said appearers declared that they do by these presents grant, bargain, sell and set over unto the said Robert Copeland, present, and accepting and acknowledging possession, and to his assigns, &c., all the right, title and interest of the New-Orleans Canal and Banking Company, the said Samuel Kohn, the said Laurent Millaudon, and the said John Slidell, in and to the lot or piece of ground situated in this parish, and designated on said plan by the lot No. 5, containing about seven hundred and seventy-seven acres, together with all the appurtenances belonging to said parcel of ground; *it being expressly understood that said vendors do not guarantee the title to the lot or parcel of ground herein conveyed, nor the quantity of land.*"

The plaintiffs read in evidence a letter, addressed by the defendant to the president and directors of the New-Orleans Canal and Banking Company, on the subject of this purchase. It contains the following paragraphs: "But I predicate my claim to a warranty of a certain extent from my vendors, upon the statement made at the time of the sale by Mr. Livermore, a director of the bank, and apparently a prominent party in conducting the sale, that the vendors

gave no warranty of title, further than was implied by law; that is to say, the obligation to return the purchase money, in case of eviction of the purchaser. This was pronounced aloud by Mr. Livermore, in addressing the people assembled on the occasion. With this statement I was satisfied, and bid accordingly. Let the deed express a warranty to that extent, I ask none beyond it. As a matter of right, the deed should likewise describe the land by its proper metes and bounds, as is done in each and every other deed which has been given for the town lots in Carrollton, &c. It is true, reference is made to a certain plan of the land made by Mr. Zimpel, but it has neither courses nor distances of lines marked on it, and is consequently of no manner of use in defining the limits or the extent of the land. I do not ask to have the lines run, I only insist that a point of beginning with the courses and distances of the lines be given to me.

"To recapitulate, I do not consent to receive the deed prepared, because it does not contain the clause of warranty, which I understood at the time of the sale, would be given by the vendors; and because it does not so describe the land as would enable me to identify it. When such a deed is presented as is free from these objections, I am ready and willing to comply with the terms of sale."

To the process verbal of the sale was annexed the plan of the lot of ground in contest.

On the trial, several bills of exception were taken to the opinion of the court, one of which was permitting the answer of the president of the Canal Bank to interrogatories to be read, without showing that he was president, and that he had authority from the bank to answer. Another exception was taken to the charge of the judge to the jury, "that a sale at auction is not null if written instructions from the vendors to the auctioneer were not produced or proved at the trial of a suit predicated on such sale. It is sufficient if the terms be clearly proved."

There was a verdict for the plaintiffs, without damages.

After a rule was taken for a new trial and discharged, the court rendered judgment, requiring the defendant to comply

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with the terms of the sale, and decreeing him to pay the first instalment of the price thereof.

From this judgment the defendant appealed.

Slidell and Conrad, for the plaintiffs and appellees.

Schmidt, for the defendant and appellant, contended as follows:

1. The appellees, claiming the *specific performance* of the contract sued on, must show, that on their part they have done all that they undertook, and the law required of them to perform. *La. Code*, art. 1908.

2. The appellant was not bound to pay the price of adjudication, until the appellees had executed a proper act of sale. *La. Code*, art. 2588. Nor can such price be exacted, except upon *delivery* of the thing sold. *La. Code*, art. 2529.

3. Though it be true, that the delivery of an immovable, is considered according to art. 2455, as accompanying "*the public act which transfers the property*," it by no means follows that the act offered by the appellees, is such a one as the law requires. The contrary is manifest from the following considerations: 1st, Land, according to the laws of Louisiana, may be sold either *by the quantity*, that is, by designating the area, or: 2d, *In the gross*, by designating the metes and bounds, without specifying the area. *Vide La. Code*, art. 2468, 2469, 2470, 2471, 2475. Whichever mode is resorted to, the act of sale must contain such a description of the land sold, as will enable the purchaser to distinguish it from other land, and to ascertain its precise location. *Vide Blake vs. Doherty et als.*, 5 *Wheaton*, 359. *La. Code*, art. 820, 822, 821, 833, 839, 840, 841, 844, 850. 4th, It is obvious that every act of sale of land is incomplete, unless the metes and bounds of the same be therein designated. *Vide Gregorio Lopez's Partidas Glosadas*, (*Madrid ed. of 1829*), vol. 2, p. 267. 3 *Partidas*, tit. 18, *de las Escrituras*, law 56. *Do. law 2*, p. 231. *Kent's Commentaries*, vol. 4, p. 451, 455. *Le Parfait Notaire*, vol. *Tapia*

Febrero, novisimo, vol. 2, p. 169, 176. And inasmuch as the act of sale, offered by the appellees, is deficient in these requisites, the appellant was not bound to accept the same.

4. The instruction given by the judge to the jury, is contrary to law. *See the authorities above cited.*

5. The judge erred in admitting the answer of Beverly Chew, as the answer of the corporation. *Vide Angell and Ames, on Corporations, p. 123, 396, 405.* For all which reasons the judgment of the inferior court should be reversed.

BULLARD, J., delivered the opinion of the court.

The plaintiffs represent that they caused to be exposed for sale at public auction a portion of land situated partly in the parish of Jefferson and partly in that of Orleans, being a part of what is known as McCarty's plantation, adjoining, but not included in the plan of a town lately laid out called Carrollton, which they had previously caused to be laid out and divided into five lots of irregular forms and unequal dimensions and a plan to be made by a surveyor. That at the public sale one of the lots designated as number five, containing about seven hundred and seventy-seven acres was adjudicated to the defendant for the price of twenty-six thousand five hundred dollars. That the conditions of the sale were, besides those respecting the terms of credit, that the purchasers should have the lines run at their own expense, and that they sold without warranty as to title or quantity. They allege that they have always been ready on their part to comply with the conditions of the sale, and have notified the defendant of their readiness to execute a notarial act of sale, but that the defendant refuses to comply with the conditions on his part. They pray judgment against him for so much of the price as is now due, and that he may be condemned to execute the notes and mortgages required by the contract.

The defendant admits the sale and the conditions so far as they relate to the price and the terms of credit, but he alleges that at the time of the sale the plaintiffs caused it to be pro-

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claimed by their authorised agent, that the title was as good as any in the state, and induced purchasers to believe that they would warrant the same, which they now refuse to do. He further avers that they have never offered to give him a good and valid title to the property, and that they have constantly refused to designate the courses and distances of the boundaries of the tract of land and to indicate to him the boundaries as they are bound to do, and which was indispensable to enable him to take possession and to verify the situation of the land. That the deed offered by the plaintiffs is not such as he is bound to accept, because it contains no stipulation of warranty and does not designate the boundaries of the tract of land.

The objection as to the stipulation of warranty has not been insisted on in argument before this court. The declaration attributed by the defendant to Mr. Livermore at the public sale amounted in fact to nothing more, than is implied in all

The vendor necessarily warrants against his own acts, and even without a stipulation of warranty is liable for a restitution of the price, unless the purchaser was aware at the time of sale of the danger of eviction and purchased at his peril.

sales. The vendor necessarily warrants against his own acts and even with a stipulation of no warranty is liable for a restitution of the price unless the purchaser was aware at the time of the sale of the danger of eviction and purchased at his peril. *La. Code, 2480 and 2481.*

The act of sale tendered to the defendant does not require of him any admission or acknowledgement which would exempt the plaintiffs from this modified warranty.

A sale at auction is complete by the adjudication, but the law requires an act of sale or written evidence of the contract, and the purchaser has a right to require such a conveyance as will truly show what he bought and the conditions of sale.

The sale was complete by the adjudication and the land became the property of the defendant; but the law requires an act of sale or written evidence of the contract, and the purchaser has a right to require such a conveyance as will truly show what he bought, and the conditions of the sale. The only question therefore on the merits is whether the deed which the plaintiffs offer to execute is in conformity with the terms of the sale at auction.

The proces verbal of the auctioneer describes the several lots of land sold by him for the plaintiffs as composing formerly the plantation of B. McCarty. The lot purchased by the defendant as number five, (V.) as per plan made by C. F. Zimpel, dated April 27th, 1833, and deposited in the office of

G. R. Stringer, notary public. Among other conditions, concerning which there is no dispute, the proces verbal states that "the purchasers are to cause the lines of their respective purchases to be run at their own expense." This plan was exhibited at the sale, and has been shown to us. It represents lot No. 5 as an irregular figure, containing seven hundred and seventy-seven acres of land. The plan embraces an out line of the whole city of New-Orleans and the upper suburbs, including the town of Carrollton, back of which the lot is represented to be situated. There is no scale on the plan, nor indication of any courses and distances; but it contains a reference to plans of survey in the office of the surveyor general. The certificate on the face of it is as follows: "plan of that part of McCarty's plantation not included in Carrollton divided in five lots, compiled from plans made by Mr. Bringier, surveyor general."

It is contended by the defendant, that although he engaged to have the lines run out at his own expense, yet the vendors are bound in their deed to furnish him such data as will enable him to do it. That the act of sale tendered does not furnish him such a description or designation of courses and distances or any point of departure, as will enable him either to identify the land or in case of a controversy with third persons to show that it is the land purchased of the plaintiffs. The grounds of defence are clearly expressed in the defendant's letter to the directors of the bank. "I only insist that a point of beginning with the courses and distances of the lines be given to me, as then and not till then have I any lines which I can cause to be run."

The plan made by Zimpel which was exhibited at the sale and referred to in the proces verbal of the auctioneer, must be regarded as forming a part of the description of the land sold, and the original title of McCarty as a part of the muniments of the defendant's title.

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It is true that the plan of Zimpel would not enable a surveyor without aid *aliunde* to ascertain whether the irregular figure No. 5, really embraces an area of seven hundred and seventy-seven acres, but by taking the measure of any square

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in New-Orleans a scale or standard might be formed by which it might be ascertained upon geometrical principles, if the plan be accurately projected. But without recurring to the titles of McCarty, and the plans in the surveyor general's office, it would be impossible to ascertain whether the lot really formed a part of McCarty's plantation. The surveyor who made the plan says that he could with this plan run the lines and lay off the land adjudicated to the defendant. That he made the plan from one of Mr. Bringier without an actual admeasurement. Mr. Pilié the city surveyor says, that the limits of the McCarty plantation are well known, but that he could not with this plan alone and the deed tendered by the plaintiffs, run the lines of lot No. 5, and that it often becomes necessary in making surveys to have recourse to other titles in establishing boundaries.

The argument of the defendant then amounts to this, that although he engaged to run the lines at his own expense, yet this necessarily implies a previous condition on the part of the plaintiffs, that they should furnish him such a deed as will in itself, without reference to any thing extraneous, enable him to run them.

It is sufficient in our opinion if the act of sale describe the land as it was described when the purchase was made, and that it does not impose on the purchaser an impossible condition. Having purchased with reference to a plan which refers again to the McCarty title and the surveys in the office of the surveyor general, the whole must be taken together, and they furnish a designation of the lot which will enable him to run the lines by recurring to the sources of information indicated in the deed and the plan. We are not acquainted with any principle of law which requires an act of sale to be so precise and definite as to courses and distances, and to furnish in itself such data, as alone would enable a surveyor to run the lines. It may be in this case difficult, but certainly not impossible, if the surveyor will recur to the guides indicated by the deed and the plan.

The defendant took a bill of exceptions to the charge of the court to the jury. Among other things he instructed the

So where land is designated on a plan which of itself refers to titles in the surveyor's office that will enable the purchaser to run the lines, it is a sufficient description to render the sale binding on him.

jury that a sale at auction is not null because the written instructions of the vendors to the auctioneer are not proved on the trial of a case predicated on such sale. We concur in this opinion of the District Court, and it may be added, that there was in this case no question of the nullity of the sale.

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A sale at auction is not null because the written instructions of the vendors to the auctioneer are not produced on the trial.

The defendant propounded certain interrogatories to be answered on oath by the plaintiffs. The answer of the corporation was sworn to by the president. The defendant took a bill of exceptions to their admission by the court, on the ground that it was not shown that the person who made answer was president, and that he was not authorised to appear and answer. It is perhaps questionable whether the president of a corporation has a right to answer interrogatories in such cases without special authority, but as the answers according to our view of the case are immaterial, we forbear to express any opinion on the question.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT.

It is too late to present a bill of exceptions to be signed by the judge after judgment is rendered, although the objection to the decision be made on the trial.

In an action of trespass for damages to the plaintiff's land, in which the petition alleges ownership and possession, and contains a prayer for general relief, the jury are excluded from an examination of the plaintiff's title.

EASTERN DIS. Where in an action of trespass the jury pronounces on the plaintiff's title,
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The objection that illegal testimony was admitted on the trial, cannot be made the ground for a new trial, when no bill of exception was taken to its admission or opposition made thereto.

The jury are not bound by the opinion of the Supreme Court in estimating the *quantum* of damages in a case.

The Supreme Court will not interfere in a point of fact on which a country jury are presumed to be better judges.

The plaintiff alleges he is owner and possessor of a tract of land in the parish of Ascension with a front of arpents and depth of forty arpents; and the forty arpents in depth on his back line he claims by right of pre-emption and occupancy for twenty years and that it has been surveyed for his use: that he has been and was in the quiet and peaceable possession of said lands, and the drains necessary to the use of the front land on the river have always emptied into and passed through the back tract of land into the swamp: that in January 1830 and constantly since, the defendant has committed divers acts of trespass on said land by cutting timber thereon and stopping up the drains whereby its cultivation is greatly impeded to his damage two thousand dollars. He prays that the defendant be desired to desist from entering and trespassing on his land, and that he be decreed to open and clear the drains which he has filled up, and pay two thousand dollars in damages; and that he be enjoined from entering and trespassing on said lands the property of the plaintiff. The petition was signed and sworn to by the plaintiff: the clerk issued an injunction thereon.

The defendant pleaded the general issue and charges the plaintiff with committing a trespass on his property, claiming the land described in the plaintiff's petition as his own, and that the plaintiff has taken possession of one hundred cords of

wood which had been cut and prepared for the use of the defendant of the value of three hundred dollars. He prays judgment decreeing him to be the rightful owner and possessor of the land, and for three hundred dollars the value of his wood and for two thousand dollars in damages for the trespass of the plaintiff. He prays that the plaintiff answer on oath the following interrogatories. "Did you or not take the one hundred cords of wood mentioned in defendant's answer? If not the whole, did you not take a part thereof, and how much?"

Several witnesses were called for the plaintiff who proved that the latter had enclosed a space or park behind his front plantation and had possessed the same for more than ten years; and that the plaintiff had made three or more ditches and drains through the said inclosure and back land. The ditches are necessary to the cultivation of the front tract. Plaintiff used the inclosure to put cattle in. That the ditches were stopped by the defendant and occasioned the front land of the plaintiff to be overflowed so as to drown his cane and corn. The water rose a foot deep in consequence of the stoppage of said drains. One witness saw the land of plaintiff overflowed once when the ditches were stopped, he estimates the damage done to plaintiff's crop thereby at five hundred dollars.

The witnesses for the defendant proved that he claimed the right to cut timber on the land behind Peytavin's plantation, and the said land is within forty arpents reckoning from bayou Lafourche on which defendant's land fronts. The testimony shows that the plantations of plaintiff and defendant front respectively on the Mississippi river and the bayou Lafourche and that the back lands claimed by each run into each other.

On this testimony adduced by the respective parties, with an attempt by the defendant to set up legal title to the premises, a trial was had. The jury brought in a verdict of one thousand dollars for the plaintiff in damages and enjoined the defendant to desist from further trespass and to open the drains, &c. From the judgment of the court rendered thereon the defendant appealed.

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The case was decided at May term 1832 of this court, and remanded for a new trial. *Vide 4 La. Rep. 46.*

During the pendency of this case in the Supreme Court on the first appeal Winter prayed for an injunction to restrain Peytavin from committing waste and trespassing upon the *locus in quo* which was granted, but after the return of the case from the Supreme Court, Winter was non-suited in his injunction suit.

On the second trial of this case most of the witnesses in the former trial were called and testified, and the testimony of those who were absent were read. It appeared since the closing of the ditches by defendant, the plaintiff's plantation was overflowed and much injury done to his crop. The witnesses estimated the damages in this respect, at more than one thousand dollars.

The plaintiff produced in evidence his application to the register of the land office in New-Orleans for the land in question, as a back concession in virtue of the act of Congress of 1820, giving a pre-emption right, and also the certificate of the register thereon granting the privilege to the applicant to enter one hundred and sixty acres at one dollar and twenty-five cents per acre which was paid by the applicant.

The jury found a verdict for the plaintiff declaring him to be the owner of the *locus in quo*, and condemning the defendant to pay \$1500 in damages, and the costs.

The counsel for the defendant filed the following grounds for a new trial.

1. That the verdict is contrary to law and evidence.
2. That the damages are excessive and oppressive.
3. That improper and illegal testimony was suffered to go to the jury.

The Parish Judge acting for the District Judge, who recused himself, over-ruled the motion for a new trial and gave judgment confirming the verdict and perpetuating the plaintiff's injunction.

After judgment was rendered, defendant's counsel tendered three bills of exception: 1. To the admission of testimony offered by plaintiff's counsel on the trial and objected to

by the defendant. 2. To the opinion of the court sustaining the objection of plaintiff's counsel to certain documentary evidence offered by defendant. 3. The refusal of the court to admit parol testimony, considered by defendant material to his case. The court refused to receive and sign the bills of exception on the ground that they were not tendered before the verdict was given and judgment rendered thereon, though they were presented within three days after the trial. The court refused to allow said bills of exception to be annexed to the present one, whereupon defendant's counsel took this his bill of exceptions to such refusal, &c.

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The defendant again appealed.

The plaintiff's counsel moved to dismiss the appeal.

Rosilius, for the plaintiff.

1. The appeal must be dismissed because the record is not certified according to law. *Code of Practice*, art. 586. 4 *La. Rep.* 8. *Hodge vs. His creditors*.

2. The transcript is made out in such an irregular, imperfect and loose manner that it is impossible for this court to act on the merits of this cause. It is the duty of the appellant to bring the record before the Supreme Court in such a shape as to enable that tribunal to afford him the relief which he seeks. 4 *La. Rep.* 46.

3. The judge *a quo* properly refused to sign the bills of exception tendered two days after the trial, when no dissatisfaction was expressed by the appellant, with regard to the points decided during the trial, and no intention of excepting to the opinions of the court intimated. 4 *La. Rep.* 19.

4. The appellee has had two verdicts in his favor—the appellant shows no title to the *locus in quo*, the question of damage for acts of trespass is peculiarly within the province of the jury.

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Lawrence and Winthrop, for the defendant and appellant.

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1. The new trial ought to have been granted on the ground set forth that the verdict is contrary to law and evidence, because the finding is beyond the issue. The jury have converted a mere action of trespass for damages into a petitory action and pronounced a verdict of ownership.

2. The plaintiff has not established his right to the *locus in quo*. All his evidence to the back concession is his application to the register to be received as purchaser and the receipt of the former for the purchase money and the platt of his lands purchased.

3. A mere inspection of this platt shows that the back concession claimed by plaintiff's tract runs into the *front* concession of the defendant, on bayou Lafourche, and it is believed that the ditches said to be stopped are embraced within the range of these conflicting lines.

4. The verdict is contrary to evidence because the damages are excessive.

5. This is not a case in which a jury is permitted to exercise their discretion and award damages beyond the amount proved. The proper distinction is made in the case of *Bourguignon vs. Boudousquie*. 2 La. Rep. 393.

6. In this case there has been two verdicts for the plaintiffs, but this is not a sufficient reason why the cause should not be remanded for another trial, if these verdicts are not, in the opinion of the court warranted by the law and evidence. The case of *Myers vs. Slack*, 5 La. Rep. 53, was submitted to five juries in which there were two mistrials and three verdicts for the plaintiffs, and on appeal it was remanded for the sixth trial. *Vide* 1 La. Rep. 174. 2 do. 469.

MARTIN J., delivered the opinion of the court.

This case was remanded from this court at May term, 1832, on the reversal of the judgment of the District Court, and the setting aside the verdict on the ground that the

amount of damages found by the jury, (one thousand dollars) was not authorised by the evidence. *Vide 4 La. Rep. 46.* EASTERN DIS.
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On the second trial, damages were given to the amount of one thousand five hundred dollars, and the case is again brought up by the defendant and appellants.

His counsel contends that the first judge erred in refusing a new trial on the ground of the verdict being contrary to law and evidence, the damages excessive, and of illegal evidence having been introduced.

He has drawn our attention to the refusal of the judge *a quo* to sign a bill of exceptions, but the refusal of the judge appears to be correct, as no bill of exception was produced for his signature until after judgment.

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It is too late to present a bill of exceptions to be signed by the judge after judgment is rendered, although the objection to the decision be made on the trial.

The verdict is complained of as being contrary to law in this regard; it finds the plaintiff to be the owner of the *locus in quo*.

The action is one of trespass, and the petition concludes with a prayer that the defendant be decreed to desist from entering or trespassing on the premises, and ordered to open and clear certain drains on his own land, and enjoined from interfering with the plaintiff's property in the premises, and to pay damages; general relief is also prayed for. It is true the petition avers the ownership and possession of the plaintiff of the premises; but the nature of the action was such as excludes the examination of the plaintiff's title by the jury. Their finding and verdict in this respect was contrary to law; but we cannot say that the court erred in denying the new trial on this account, as this part of the verdict might well have been disregarded.

In an action of trespass for damages to the plaintiff's land, in which the petition alleges ownership and possession, & contains a prayer for general relief, the jury are excluded from an examination of the plaintiff's title.

Where in an action of trespass the jury pronounces on the plaintiff's title, this part of the verdict may be disregarded, and judgment rendered on the claim for damages.

On the score of the verdict being contrary to evidence, it appears to us as it did last year, that the new trial was properly refused.

With regard to the testimony and evidence illegally admitted, we think the objection was correctly overruled, as no bill of exceptions show that any opposition was made at the trial.

As to the excessiveness of damages, the plaintiff has had two verdicts; in the second, the jury were probably informed

The objection that illegal testimony was admitted on the trial, cannot be made the ground of a new trial, when no bill of exceptions was taken to its admission or opposition made thereto.

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The jury are not bound by the opinion of the Supreme Court in estimating the quantum of damages in a case.

The Supreme Court will not interfere in a point of fact in which a country jury are presumed to be better judges.

during the last trial, that we considered the damages given by the first jury as too great. Although the second jury was legally bound to give some consideration to the opinion of the highest court of justice in the country, they ought not to permit it to stand between God and their consciences, and yield their opinion to ours in this respect. They have exercised this right, and the district judge by denying a new trial, though this was insisted on as some testimony in favor of their conclusion, we think duty does not require our interference on a point of fact, on which a country jury are presumed to be better judges than us.

But we think the District Court erred notwithstanding the verdict, in giving judgment as in a petitory action.

It is therefore ordered, adjudged, and decreed, that the judgment of the District Court be annulled, avoided, and reversed; and it is further ordered, adjudged, and decreed, that the plaintiff recover from the defendant the sum of fifteen hundred dollars, and that the latter be enjoined from trespassing on the premises or disturbing the plaintiff in his possession thereof; and that he pay the costs in the court below; the appellee paying those in this court.

LANGE ET ALS. vs. RICHOUX ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The article 944 of the *Louisiana Code*, establishes the principle that the capacity of heirs to inherit depends on the law in force at the time the succession is opened.

According to the Spanish law in force in this State before the adoption of the *Civil Code* in 1808, proof of birth was equivalent to the acknowledgment on the part of the mother, of natural children.

So proof of co-habitation with the mother as sole concubine is tantamount to an acknowledgment of maternity. EASTERN Dis.
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The 221st article of the *Louisiana Code* provides that the acknowledgment of an illegitimate child by the father shall be made before a notary and two witnesses, when not made in the registry of the birth or baptism. LARGE ET AL.
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But illegitimate children not legally acknowledged, may be allowed to prove their paternal descent if they are free and white.

In regard to the mother, illegitimate children of every description, may make proof of their maternal descent, if she is not a married woman.

While a person continues a *statu liber*, he is capable of receiving by donation or testament but not by inheritance.

A partition will neither be confirmed or annulled without all the parties to it being before the court.

The plaintiffs, Eleanor, Mary Ann and Valerién Lange, f. p. c. allege that they are the only collateral heirs of one Française Gabrielle Lorio, f. w. c. who died intestate on the 13th June, 1830, in the parish of St. Charles, possessed of movable and immovable property, and leaving no heirs in the ascending or descending line; that they are the legitimate descendants of Marie Jeanne Lange, f. w. c. the only sister of the deceased; that in June, 1830, an inventory of the property in said parish was made amounting to three thousand one hundred and twenty-three dollars, which was entrusted to the care of one Française Martin Richoux and Joseph Richoux, her husband, f. p. c. who became responsible to account for it when legally required.

It is alleged there are three lots in the upper part of New Orleans which were owned jointly by the deceased and one Marie Jeanne, f. w. c. that the defendants have made a partition of the same with Marie Jeanne, by which they received two of said lots, and which they have sold to R. Toledano by public act, dated 23d April, 1831. This partition is alleged to be illegal, as the defendant Française, the wife of Richoux, was incapable of inheriting at the time of the decease of Française Gabrielle, being born and was then a slave.

The petitioners allege that they are the lawful owners of

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all of said property, as heirs of the deceased, and demanded the delivery of it by the defendants, who refuse and one of them, the said Française wife of Richoux, claims it as the only heir of the deceased.

The plaintiffs pray that they may be declared to be the lawful and only heirs of the deceased Française Gabrielle, and that said property inventoried and put into the possession of the defendants may be surrendered up, and that the sale of the two lots in the city of New Orleans to Toledano be annulled, and that he be decreed to surrender up said lots.

The plaintiffs in a supplemental petition, expressly charge that the defendant Française, wife of Richoux, was a slave at the time the succession of Française Gabrielle deceased, was opened, and therefore incapable of inheriting; and that it is incumbent on her to show that she was free at that period.

The defendants except to the right of the plaintiffs to sue, as being born of slaves, and never legally emancipated; and that the supplemental petition was filed *ex parte*, and is inconsistent with the original one. They deny that the plaintiffs are the heirs of the deceased, or have any claim to her succession and aver that Françoise, wife of Richoux, is the descendant and heir of the deceased, and as such is entitled to her estate. They admit they are in possession but deny every thing else.

Toledano answered, admitting he purchased the two lots in question and that Richoux had a good title to it, and denies the plaintiffs have any.

It was admitted by defendants, Richoux, that plaintiffs are the only legitimate children of Charles Lange, f. m. c. by Française Pain, f. w. c.; that Charles Lange was only child of Joseph Lange and Marie Jeanne, people of colour; that Marie Jeanne was purchased by Joseph Lange from Hydel, and was afterwards married to him; that Marie Jeanne was daughter of Catharine and Gorr, negro slaves at the time of her birth, &c.; who were afterwards sold to Gabrielle Lorio, who emancipated Catherine in 1803, and

sold Gorr to Marie Jeanne in 1804, who immediately emancipated him, calling him in the act father; that *Françoise Gabrielle Lorio* was the daughter of Catharine, born while the slave of Hydel, but denied that Gorr was her father, or that Gorr and Catharine were ever married: it is denied that Marie Jeanne was ever legally emancipated, &c. The plaintiffs admit that *Françoise Gabrielle Lorio* while the slave of Hydel had a son named Martin, her only child; that she was purchased by Gabrielle Lorio and by him emancipated in 1794, and in 1799 he bought Martin, son of *Françoise* from Hydel, and in 1807 made a donation of him to his mother, in which he is recognized as her son.

It is admitted that Martin died before his mother, leaving an illegitimate daughter by the sister of Gabrielle Lorio, who was also his slave and his child; that *Françoise*, wife of Richoux the defendant, was born in 1802, and was liberated by Gabrielle Lorio, 26th October 1820. The plaintiffs deny that either Martin or *Françoise Richoux* were legally emancipated, or that the latter has been recognized so that she can inherit.

The district judge in pronouncing judgment in this case considered it admitted and established that the plaintiffs are the legitimate representatives of Marie Jeanne, f. w. c., who was their grandmother and sister of the deceased; and that the defendant *Françoise Richoux* is her grand-daughter; that Marie Jeanne and *Françoise Gabrielle* were the offspring of one Gorr and Catharine, born slaves, and afterwards manumitted by Gorr and Catharine.

The marriage of Gorr and Catharine being denied, and proof being made that no record of marriage was kept in the parish where they resided for people of color, it was permitted to be proved by circumstances establishing the presumption of marriage according to the Spanish law. But supposing they were not married, the district judge considered, that according to the laws existing at their death, their children could inherit, at least from the mother without any acknowledgement. The plaintiffs have, therefore, established their capacity to inherit and a title to the succession.

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On the other hand it is admitted that Française Gabrielle, the deceased, had an only child, Martin, born a slave, and that the defendant Française Richoux, is his only child; and it is proved that Martin died a slave, his mother still living, and that the defendant Française has furnished no evidence of her emancipation except the will of Gabrielle Lorio, whose slave she was; the testator made his will in 1820, died in 1822 when Française was twenty years of age, so that she continued to be a slave or at most *statu Libera*, not having attained the age of thirty years and none of the forms of law having been complied with, required to complete her emancipation. The district judge concluded there were two insurmountable objections to defendant's right of recovery: 1. That Française Gabrielle never acknowledged Martin to be her son and that the latter never recognized the defendant to be his daughter. 2. That the defendant has not yet obtained her freedom.

There was judgment for the plaintiffs. The defendant's appealed.

Jantn, for the plaintiffs and appellees.

1 The plaintiffs are the only and legitimate children of Charles Lange the son of Joseph Lange and Marie Jeanne the sister of the *intestate*. By the marriage of Joseph Lange and Marie Jeanne the latter became free although born a slave. If her son Charles was born afterwards he was of course free, if before he was emancipated and legitimated by his father's and mother's marriage. *Partida 4 tit. 13, l. 1. Ibid. tit. 5, l. 1. Ibid. tit. 22, l. 5. Teatro de leg: vol. 12. 139.*

2. But Joseph Lange instituted Marie Jeanne and Charles his heirs, calling the former his wife and the latter his son. This alone would be sufficient to render them free and legitimate. 3 *Febrero*, (ed: 1818) 271. *Partida 4 tit. 15. l. 2. Ibid 6, tit. 3, l. 3.*

3. Gorr and Catherine, the father and mother of Marie Jeanne and Française were born slaves, but emancipated by Hydel in 1803-4. Their subsequent liberty by giving the

civil effect to their marriage rendered their children legitimate. *Girod vs. Lewis*, 6 Mar. 559. The plaintiffs are therefore entitled to the succession under the *La. Code*, art. 908.

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4. But even if Gorr and Catherine had not been married, if Marie Jeanne and Française Gabrielle had been natural children, Marie Jeanne's legitimate descendants can inherit of Française Gabrielle by article 917 of the *Louisiana Code*. If the father and mother of the natural child die before him, the estate of such natural child shall pass to his natural brothers and sisters or to their descendants.

5. The case of the plaintiffs is completely made out. But the defendants urge that natural brothers and sisters can only inherit of each other if they have been legally acknowledged by their natural parents.

6. The law does not require that natural brothers and sisters should have been legally acknowledged by their father to be entitled to inherit from each other.

7. The defendants urge that Marie Jeanne and Française Gabrielle should have been acknowledged by a notarial act according to article 221 of the *Louisiana Code*, as the succession was opened under this Code.

8. But it is only the *right* of inheriting that is to be determined by the law in force when the succession is opened; not the state and condition or capacity of the heir to inherit.

9. The state and condition or capacity of the heir is governed by the law under which it was acquired and when once vested, it cannot be taken away by subsequent laws.

10. The question then, whether Marie Jeanne and Française Gabrielle were duly acknowledged as natural children must be determined by the Spanish law. This law did not require natural children to be acknowledged by notarial act or in writing. 5 *Febrero*, (ed: 1818) p. 32, 33, nos. 52, 53, 54. 1 *Ibid* p. 67, nos. 77, 78.

11. The defendant Française Richoux cannot inherit. Her father (Martin) was born and died a slave and never was capable of inheriting, consequently his daughter cannot take through him by right of representation. 3 *Paillet successions* 514. *Gomez ad leg: Tauri XII.* no. 61.

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12. Representations does not take place in irregular successions. 2 Favard de L'Anglade, Verbo enfant naturel sec. 4, p. 340. 13 Sirey part 1. 161. Paillet Man: on art. 765, a. no. 1.

13. The defendant was never acknowledged by her father, as in the certificate of her baptism her father is said to be unknown.

14. She was not free at the time of opening the succession of the intestate. She was born a slave the 20th April 1802, consequently was not thirty years old at the opening of the succession.

15. By the will of Gabrielle Lorio her master, made in 1820 when she was eighteen years of age, she became a *statu libera* and entitled to freedom at the age of thirty years.

16. A *statu libera* cannot inherit *ab intestato*. 3 La. Rep. 176. 7 N. S. 351.

17. The natural child of a natural child cannot inherit *ab intestato* from her father's parents whether she is legitimate or not, nor can the grandfather inherit of his natural son's illegitimate child. La. Code 915, 916. 4 Toullier 262, sec. 259. 2 Chabot de Fallier 219.

Strawbridge, for the defendants and appellants.

1. The article 917 of the La. Code says, "if the father or mother of the natural child die before him, his estate shall pass to his natural brothers and sisters or their descendants." The question then is who and what are the qualities to inherit under this article.

2. The article relates to natural children *duly acknowledged* who have died without posterity, and whose father and mother are also dead. None can inherit but the natural brothers and sisters who derive their heirship through a legal acknowledgment. For the description of persons included in the term *posterity*, reference is made to 2 Delvincourt 22; note 1, 259. Ibid 23, note 6, 273. 4 Toullier, No. 269. 2 Chabot, 323, on art. 765 of Nap. Code.

3. Posterity, says our code, art. 3522, No. 26, comprehends "all descendants in the direct line."

4. It is contended that proof of maternity is admissible according to the article 230 of the *La. Code*; and if it be so article 226 equally admits proof of paternity.

5. The syllogism then stands thus:

The estate of natural children deceased without posterity belongs to the father or mother who has acknowledged him, or in equal portions to the father and mother when he has been acknowledged by both. *La. Code*, 916.

6. But proof of maternity, (art. 230) or paternity (art. 226) may be made by children who have not been acknowledged.

Ergo, the father or mother who have not acknowledged their child may inherit?

Ergo, the father or mother who has not acknowledged may inherit equally with the other parent who has?

Ergo, it is not necessary that both parents should have acknowledged in order to inherit equally?

Ergo, the word acknowledgment has no meaning?

7. So much of article 224 as declares the rights of natural children are regulated under the title of succession, and of 945 as declares that he who wants the qualities prescribed at the time of opening the succession cannot inherit, should be considered as not written.

8. It has been stated that *paternity* was a fact and once made out the acknowledgment was of no consequence. All illegitimate children whether acknowledged or not, of whatever class, are entitled to alimony, and of course for this purpose, proof of paternity is admissible without acknowledgment.

9. But acknowledgment is one of the essential qualities to entitle to the inheritance of an irregular succession; the proof of which is the authentic act or baptismal register. Proof of parentage without acknowledgment no more entitles to the inheritance than proof of a mortgage without recording authorises a claim of the debt from a *bona fide* purchaser.

10. In this case the plaintiffs are not claiming as children

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of Française Gabrielle; they are collaterals claiming through her mother; does our law permit this?

11. The law in force when this succession was opened does not entitle the plaintiffs to inherit. An acknowledgment by notarial act or baptismal certificate is essential to entitle the parent of a natural child or those claiming under them to inherit.

BULLARD, J. delivered the opinion of the court.

The plaintiffs instituted the present action to recover from the defendants the succession of Française Gabrielle a f. w. c. deceased intestate. They allege and have proved their legitimate descent from Marie Jeanne the reputed natural sister of the deceased and are her grand nephews and nieces. The defendant Française f. w. c. sets up a claim to the succession as the descendant of the deceased through Martin her natural son, and claims as natural grand-daughter of the deceased.

In support of the pretensions of the plaintiffs, their counsel relies on the art. 917 of the *Louisiana Code*. "If the father and mother of the natural child died before him, the estate of such natural child shall pass to his natural brothers and sisters or to their descendants," coupled with the preceding article which declares that, "the estate of a natural child deceased without posterity belongs to the father or mother who has acknowledged him or in equal portions to the father and mother when he has been acknowledged by both."

It is contended by the defendant that the word *such* in the article first recited refers to natural children as described in the preceding article, as being acknowledged by the parents in the mode pointed out by the Code; either by notarial act or the register of birth or baptism; that Gabrielle and Marie Jeanne cannot be regarded as natural sisters and entitled to inherit from each other, unless both were acknowledged by their common parents. He further insists that the capacity to inherit depends on the law in form at the opening of the succession, and that neither Marie Jeanne nor Gabrielle

could now inherit the estate of their reputed father and mother for want of this essential proof of quality, and that consequently Marie Jeanne would be incapable, if she had survived Gabrielle of inheriting her estate, not having the proof of descent which alone would make her for the purpose of inheriting, the natural sister of Gabrielle; and that if Marie Jeanne could not take the estate, neither can her descendants the present plaintiffs.

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We may therefore lay out of view the intermediate descents and consider the present suit as if Marie Jeanne had survived, and were herself the plaintiff before this court claiming the succession of her reputed sister. The position then maintained by the defendant's counsel is, that she could not recover because she does not exhibit the authentic acknowledgement by Gorr and Catherine that she and the deceased were their natural children.

The article of the Code which regulates the succession of natural brothers and sisters in relation to each other does not restrict the right to sisters or brothers of the full blood. Whether Marie Jeanne was a full or only a half sister is therefore immaterial. The paternal side may be laid out of view. And the question is then narrowed down to this; is there such evidence that she and the deceased were both daughters of Catherine as to entitle her to the quality of natural sister of Gabrielle, who ever their fathers may have been?

The Code establishes the principle, that the capacity to inherit depends on the law existing at the time the succession is opened. "The incapacity of heirs is the absence of those qualities required in order to inherit at the moment the succession is opened. He who wants these qualities at this time cannot be the heir." *La. Code, art. 944.*

The article 944 of the Louisiana Code, establishes the principle, that the capacity of heirs to inherit depends on the law in force at the time the succession is opened.

That the evidence shows Gabrielle and Marie Jeanne to have been both natural children of Catharine according to the Spanish law in force before the promulgation of the Code, we have no doubt. The 11th law of *Toro* required that to be regarded as natural children, there should have existed at their birth or conception no legal impediment to the mar-

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According to the Spanish law in force in this State before the adoption of the Civil Code in 1803, proof of birth was equivalent to the acknowledgement on the part of the mother of natural children.

So proof of cohabitation with the mother as sole concubine is tantamount to an acknowledgement of paternity.

The 221st article of the Louisiana Code provides that the acknowledgement of an illegitimate child by the father shall be made before a notary and two witnesses when not made in the registry of births or baptism.

But illegitimate children not legally acknowledged may be allowed to prove their paternal descent if they are free and white.

In regard to the mother, illegitimate children of every description may make proof of their maternal descent, if she is not a married woman.

riage of the parents, and that they should be acknowledged by the father, dispensing however with any formal acknowledgement when the mother lived in the same house with the reputed father and was his sole concubine. Under this law it was considered by the ablest commentators that proof of birth was equivalent to acknowledgement on the part of the mother, and proof of cohabitation with the mother as sole concubine tantamount to an acknowledgement of paternity. *Gomez ad leges Touri*, 91 et seq. 1 Febrero Novisimo, 380 et seq.

But it is urged that the Code has introduced a new rule on this subject and that without the formal acknowledgement by notarial act or in the baptismal register, the natural child is without capacity to inherit.

Article 221 declares that, "the acknowledgement of an illegitimate child shall be made by a declaration before a notary public and two witnesses whenever it shall not have been made in the registering of the birth or baptism of such child. If this article stood alone we should perhaps be compelled to say, that the subsequent articles under the head of successions, in which the *due acknowledgement* is spoken of, referred to this as the sole and exclusive evidence of natural descent and that whatever may have been the condition or rights of the parties under the previous legislation of the country, their right to inherit as natural children under the Code would depend upon their furnishing this exclusive evidence of their capacity. But this article does not stand alone. Article 226 provides that "illegitimate children who have not been legally acknowledged may be allowed to prove their paternal descent provided they be free and white;" and with respect to the mother article 230 declares that "illegitimate children of every description may make proof of their maternal descent, provided the mother be not a married woman." The article 227 is substantially a re-enactment of the law of *Toro* above referred to. The words used in article 221 are not prohibitive, and so far from declaring that a declaration before a notary shall be the only proof permitted, the Code expressly permits other modes of proof both of paternal and maternal descent without any restriction as to the purpose for

which it may be allowed. Although there may be cases in which the child may prove his paternal descent without being entitled to inherit, as in cases of adulterous bastards, who may be entitled to alimony, yet as relates to the mothers the rule under the law of *Toro* was different and the child born out of marriage whether spurious or natural, whether by an acknowledged or unknown father, "salvo si los tales hijos fueren de damnado y punible ayuntamiento," were called to her inheritance to the exclusion of all except her legitimate children. 11 *Toro*, 4 *Martin Rep.* 265, *Pigeau vs. Duvernay*.

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Even under the Code Napoleon which contains enactments much stronger than ours, it seems to be the general opinion of commentators that proof of maternity may be made in all cases, and that this forced acknowledgement has the same effect as the voluntary one in authentic form. 3 *Duranton*, 235, 236, 253, 2 *Toullier No.* 940, 950, 4 *Favard de L'Anglade*, 742, 2 *Chabaud des successiones*, 342.

We are therefore of opinion that Marie Jeanne and Gabrielle are proved to have been natural sisters, and capable of inheriting from each other, and that the plaintiffs are entitled to recover unless the defendant shows herself descended from Gabrielle and capable of taking the inheritance at the time the succession was opened.

It is not necessary to inquire whether the defendant has shown by sufficient evidence that she is the child of Martin, the son of Gabrielle. Martin, it is shown, was born a slave and died in that condition in the lifetime of his mother. The defendant herself was originally a slave but emancipated by the will of her master, and her freedom to be complete as soon as the existing laws would permit. She then became *statu liber*, and at the death of Gabrielle she had not attained the age of thirty. While she continued a *statu liber* she was capable of receiving by donation or testament, but not by inheritance. *Civ. Code*, art. 193, 176.

While a person continues a *statu liber* he is capable of receiving by donation or testament but not by inheritance.

The plaintiff further claims two lots of ground in the faubourg La Course in possession of R. Toledano, who was made a party. He answers that he purchased two lots of the defendants and alleges that they had a good title. The

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ET ALS.**

A partition will
neither be con-
firmed or annul-
led without all
the parties to it
being before the
court.

inventory shows that the defendant declared, that Gabrielle was in her lifetime owner jointly with Marie Jeanne and Gabrielle Lorio, f. w. c. of three lots in that faubourg which had been bequeathed to them by Gabriel Lorio. They then exhibit the testament of Gabrielle and a partition between the defendants and Marie Jeanne, in which the defendant assumes to act as the sole heir of Française Gabrielle and by which two of the lots were assigned to the defendant as the share of Gabrielle. If we were now to decree the two lots to the plaintiffs it would admit the validity of the partition; and if we were to regard the partition as null for want of sufficient parties we should be deciding on the rights of those who are not before the court. The will of Gabriel Lorio does not mention any town lots, and the plaintiffs furnish no other evidence of ownership in Gabriel Lorio than the declaration of the defendant. If the plaintiffs have any right it is to one undivided half of the three lots. It is besides very questionable whether heirs by irregular succession can maintain an action against third persons before their own right to the estate has been judicially recognised. *La. Code, art. 919.*

The District Court gave judgment generally for the plaintiffs without expressly pronouncing on the rights of the defendant *Toledano*, and the parties have agreed that in this court the judgment should be considered as to him as one of non-suit. We think the plaintiffs have not shown sufficiently a legal title in themselves to entitle them to recover in this case, and that the judgment in favor of *Toledano* as in the case of a non-suit ought to be affirmed.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs, and that there be judgment in favor of *R. Toledano* as in the case of a non-suit, with costs as to him.

THOMAS ET ALS. vs. BREEDLOVE ET ALS.

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ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where notes are put into the hands of a surety to indemnify him against loss on payment of a surety debt, if it is shown that the obligors in said notes were insolvent or became so very soon after, the failure to collect or to pursue them is not imputable to the holder.

A citation or something equivalent in law is necessary to the validity of every judgment.

A partnership claim put on the bilan is not notice to an individual partner whose claim is omitted, and he is not a party to, or bound by the proceedings.

A creditor who is not put on the bilan for his individual claim and cited to attend the *concurso* of creditors, is not bound by their proceedings, even if he is placed on the tableau of distribution, but declines receiving dividends.

The proceedings of a debtor against his creditors are *res inter alios acta* as to any one who is not on the bilan, and whose claim is not mentioned therein.

The plaintiff's claim from the defendants J. W. Breedlove and W. L. Robeson, a debt of six thousand and three dollars with interest, as due the succession of the late Joseph Thomas. In 1827 Thomas became the surety in an appeal bond for the then commercial firm of Bedford, Breedlove and Robeson, who were appellants from a judgment obtained against them by Aikin & Gratz for four thousand seven hundred and thirty-two dollars with ten per cent. interest thereon until paid. This judgment was affirmed by the Supreme Court in March or April, 1827. While the appeal was pending, the firm of Bedford, Breedlove & Robeson failed and made a cession of their property to their creditors. Aikin & Gratz instituted suit against Thomas on the appeal bond, and recovered from him as surety the amount of their

EASTERN DIS. judgment against Bedford, Breedlove & Robeson, amount-
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 ing to six thousand and three dollars including interest and
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The petitioners being the wife and children of Joseph Thomas, who died the 19th April, 1832, claim this sum for his succession. They pray judgment therefor against the defendants.

The answer admits the suretyship of Thomas, the appeal and affirmance of the judgment, but denies the other allegations, and avers that they are not responsible, because at the time of signing the appeal bond, the firm of Bedford, Breedlove & Robeson transferred to Thomas as collateral security, and as an indemnity against his suretyship four promissory notes drawn by A. W. Breedlove & Co., and endorsed by Breedlove & Greenleaf, a firm at Port Gibson, in Mississippi, amounting to six thousand dollars payable at short periods from January 23, 1827. That since the appeal bond was executed the said firm failed and made a surrender of all their property to their creditors, which was accepted, syndics appointed, and the insolvents discharged according to law; that pending the *concurso* Thomas became a party thereto, was put on the tableau of distribution, and was entitled to claim his dividend.

It was proved on the trial that the notes given to Thomas as collateral security were never paid, and that in the year 1827, when the notes became due, both the drawers and endorsers of them were in bad credit, but the payment of some notes on them were secured by the vigilance of an attorney residing at Port Gibson. That in 1828, the parties to said notes ceased to pay their debts and were reputed insolvent. Judgment was obtained against Thomas on the appeal bond the 17th June 1827, which he paid by two instalments in June 1827 and February 1829.

The evidence showed that Bedford, Breedlove & Robeson, made a cession of their property in March 1827, and that no mention of the surety debt paid by Thomas was made in the bilan; but that *Thomas* and Kernion were placed thereon for a debt of two hundred and seventy-four dollars, appeared

at the meeting of creditors, voted for syndics and a discharge of the debtors. Neither Aikin and Gratz nor Thomas were placed on the bilan in relation to this debt. The syndics filed a tableau of distribution in 1831 on which Thomas was placed as a creditor for the sum of five thousand eight hundred and fifty-three dollars, and a dividend of fifteen per cent. declared: and on another tableau filed in 1833 for four thousand nine hundred and seventy-five dollars, being the same debt with the first dividend off, with another dividend of fifteen per cent. The usual notices were given previous to homologating the tableaux; and the creditors also notified to call and receive their dividends, but no one appeared for or on behalf of Thomas. He never received any dividend.

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The district court considered the makers of the notes deposited as collateral security as insolvent when the notes became due, and that Thomas was not liable on failure to collect them. But he considered the defendants liberated by the proceedings and their discharge under the insolvent laws, from the payment of this debt, and gave judgment dismissing the plaintiffs' petition from which an appeal was taken.

Maybin and Strawbridge, for the plaintiffs and appellants.

McCaleb and Gray, for the appellees.

MATHEWS, J., delivered the opinion of the court.

In this case the plaintiff sues as executrix of the last will and testament of her late husband Joseph Thomas, as tutrix of her minor children and as partner in the matrimonial acquets and gains, to recover debts alleged to be owing by the defendants to the succession of the deceased Joseph Thomas. Judgment was rendered in favor of the defendants in the court below, from which the plaintiff appealed.

The evidence of the cause shows that Thomas in his life time became surety on an appeal bond for the defendants or for a commercial firm composed of one Bedford and them.

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This bond was made in favor of Aikin and Gratz, who had obtained a judgment against the house of Bedford, Breedlove and Robeson in December 1826, from which an appeal was taken by the latter and the judgment of the District Court was finally affirmed. The surety was pursued on the bond and paid to the appellees in that suit the amount of their judgment and costs, and also the amount of costs incurred in defending the suit against him on the bond, &c. This payment seems to have been made by instalments in 1827 and 1828, and amounted to the sum of six thousand one hundred and ninety-nine dollars and forty-six cents.

Previous to the payment made by the surety, viz.: in the month of March 1827, Bedford, Breedlove and Robeson ceded their property for the benefit of their creditors, &c. and at the time of signing the appeal bond they placed in the hands of the surety certain promissory notes, (as collateral security) drawn and endorsed by certain commercial firms in the state of Mississippi. At the meeting of creditors called on the failure of Bedford, Breedlove and Robeson, Thomas was not put on the bilan as a creditor on account of the debt now claimed by his representatives, nor was he cited to appear in relation to this claim, which was then only contingent. He was however afterwards placed on the tableaux of distribution by the syndics without his interference, and always declined to take any dividend of the insolvents estate.

On these facts the defendants have assumed two principal grounds of defence. 1st. That the surety was so negligent in endeavoring to recover on the notes which were placed in his possession for collateral security, as to lose the sums therein promised, an amount more than sufficient to indemnify him for his responsibility incurred by the bond. The loss thus incurred, the defendants allege ought to be borne by the surety and they freed from the obligation to refund, &c.

The second ground of defence assumed is that the cession of property made by Bedford, Breedlove and Robeson, and acceptance by their creditors has relieved them from all absolute obligations to pay any debts which existed at that time, whether certain, conditional or contingent.

As to the first means of defence, it was in our opinion properly repudiated by the court below. The testimony shows pretty clearly that the obligors on the notes, (if not at the precise time when they became due) were very soon afterwards insolvent, consequently no negligence was imputable to the holder in not pursuing them.

The questions involved in the second may be termed legal and are not free from difficulty which too often occurs in cases of insolvency, notwithstanding the positive legislation on this subject, and the numerous commentators of Spanish writers in relation to the *concurso de acreedores*. The most important if not the sole question which arises in the present case is, whether the plaintiff as representing the succession of her husband is bound by the proceedings and judgment of the *concurso* formed at the instance of Bedford, Breedlove and Robeson, so as to bar the action now brought?

We lay it down as a first principle in our jurisprudence that citation to a defendant or something which the law prescribes as an equivalent, is necessary to the validity of any judgment. By express statutory provisions of the state, citation to the creditors in a *concurso* is required. In the 8th section of the act of 1817 which refers for the manner of calling creditors together to the *art. 4 tit. 16 book 3* of the *Old Code* which relates to respites; but which was adopted by the act of 1817 in cases of cession of goods. This article of the Code requires that creditors residing within the parish where the meeting may be called, should be summoned to attend by process issued from the court holding cognizance of the *concurso*. Thomas in whose right the debt is claimed from the defendants was not placed on the bilan of the debtors as a creditor in his individual capacity, although he was there placed as joint creditor with another person under a partnership claim for a small amount and voted on this claim for syndics, &c. He was not cited according to law being a resident of the parish where the *concurso* was pending. Under these circumstances we are unable to perceive any good reasons why he or his representatives should be concluded by the proceedings and judgment in that case.

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When notes are put into the hands of a surety to indemnify him against loss on payment of a surety debt, if it is shown that the obligors in said notes were insolvent or became so very soon afterwards, the failure to collect or to pursue them is not imputable to the holder.

A citation or something equivalent in law is necessary to the validity of every judgment.

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A partnership claim put on the bilan is not notice to an individual partner whose claim is omitted, and he is not a party to or bound by the proceedings.

The knowledge which he had of the surrender of property in consequence of the partnership credit which belonged to him and another inspector of tobacco, certainly did not make him a party in his individual capacity. Not having been placed on the bilan as a creditor in his own separate right and not having been summoned to the meeting by service of citation in relation to the debt now claimed by his representatives, we consider that he ought not to be viewed in the light of a party to the *concurso*, and consequently that the proclamations and public advertisements in relation thereto can legally, in no manner affect the interests of the plaintiffs in present action. At the time of that proceeding he was only a contingent creditor. If it be admitted in pursuance of the doctrine established in the works of *Salgado* and *Febrero* that he had a right to cause himself to be placed on the bilan, it could have been only done for conservative purposes being a creditor merely contingent. This right of demanding a place in a *concurso*, by contingent creditors appears to us to be a privilege decreed to persons in that situation which may be waived by them without affecting their credits.

A creditor who is not put on the bilan for his individual claim and cited to attend the *concurso* of creditors is not bound by their proceedings, even, if he is placed on the tableau of distribution but declines receiving dividends.

As Thomas was not placed on the bilan of the defendants nor cited to the meeting of creditors, the circumstance of afterwards giving him a place on the tableau of distributions not only without his solicitation but even contrary to his will (as appears by the constant refusal to partake in the dividends,) does not constitute him legally a party to the proceedings carried on by the insolvent's against their creditors, so as to gain the judgment in that case the force of the thing adjudged, (*rei judicatæ*) against the creditor or those who now claim in his right.

The case cited from 7 *Martin*, N. S. 564, is not similar to the present. The plaintiffs had been placed on the bilan and were cited as creditors. They claimed as endorsees and the note on which their claim was grounded had been placed on the schedule in the name of the payees and they suffered judgment to be pronounced without opposition, which declared the payees to be bona fide holders and real creditors. The case now under consideration is not, (in our opinion)

distinguishable, in any important feature from that of *Bainbridge vs. Clay*, 3 N. S. 262. Before the commencement of this suit the proceedings in the *concurso* of the creditors of the defendants had been homologated and dividends declared. The principles established in the case of *Taylor vs. Hollander*, 4 Martin N. S. 535, and that of the *Franklin Bank vs. Nolte et al.*, are therefore not applicable to the matters now in contest. The cause must be decided in conformity with the doctrine established by the opinion and judgment rendered in the case of *Bainbridge vs. Clay*.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled: And it is further ordered, adjudged and decreed, that the plaintiffs and appellants do recover from the defendants and appellees the sum of six thousand and three dollars principal, and one hundred and ninety-six dollars cost with interest on two thousand nine hundred and thirteen dollars sixty cents, at the rate of six per cent per annum from the 21st June 1827, and like interest on three thousand and eighty-nine dollars and ninety-six cents, from the 24th of June 1828 until paid with costs in both courts.

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The proceedings of a debtor against his creditors are *res inter alios acta* as to any one who is not on the bilan and whose claim is not mentioned therein.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a mercantile firm is part owner of a steamboat and acts as the agent of a co-proprietor at a distance to insure his interest therein, and afterwards discontinues such insurance without any instructions from him, and the boat is lost, the firm is liable for the amount of such interest uninsured.

And the circumstance that the firm rendered an account current to the co-proprietor before the loss of the boat in which the charge of the premium for insurance is omitted and no objection made, will not be considered as notice of a discontinuance of the agency to insure so as to excuse the party from his liability.

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The plaintiff residing at Shippingport, in Kentucky, was joint owner with the defendants and one T. W. Bakewell, of Cincinnati of the Steamboat Hercules. He charges in his petition that said boat was sent to New-Orleans to run in the tow-boat business between that city and the Balize in the month of April 1826, when the defendants were instructed to cover the inerests of the petitioner by insurance, being valued at five thousand dollars, which they were to re-new every six months from that date. That in the summer of 1827, said boat wanting some repairs was sent to Shippingport for that purpose. The defendants took out a policy covering said interest every six months, and had her insured on leaving New-Orleans, but when she returned from Kentucky in December 1827, they discontinued any further insurance of the plaintiff's interest without any express instructions on the subject; still continuing as before, to insure their own interest in her. She continued rinning in the tow-boat business until December 1828, when she was lost by the perils of the river. The plaintiff claims the amount of his interest amounting to five thousand dollars, which he alleges was lost by the negligence of the defendants to insure his interest therein as they were bound to do.

The defendants pleaded the general issue.

The facts of the case show that the defendants were commission merchants in New-Orleans, and kept the accounts of the Hercules and with whom the plaintiff had a regular account and business. They effected and paid the insurance on plaintiff's interest in the Hercules up to the 30th May 1827. In an account current rendered by the defendants on the 31st August 1827, the premium for the insurance of plaintiff's interest in the Hercules to Louisville, is charged. The next account current was rendered the 30th May 1828, to the plaintiff in which there was no charge for insurance.

On the 28th December 1827 soon after the return of the boat to New-Orleans, the defendants wrote to T. W. Bakewell in Cincinnati also a joint owner, in which they say; "In regard to the insurance on the Hercules we can only refer you to what we have already written. We have paid the amount

conceiving that your having made no objection to the first charge made and your not directing us to discontinue the insurance was sufficient authority for us to do so, and we really cannot see any reason why we should suffer the loss of this amount. We put it to you whether *once* being directed to cover a property at risk under our charge, (the same risk continuing at the expiration of the temporary policy and no new instructions being sent) you would not consider yourself in duty bound to renew the insurance. We conceive that any prudent agent so situated would act as we have done, and we are quite sure that we should not hesitate to approve any one so acting when our property was concerned. We of course have not insured any thing beyond our own interest in this boat, presuming that both yourself and Mr. Berthoud will advise us if we are required to do so any more." Their is no evidence that Mr. Berthoud was apprised of the contents of this letter, although the plaintiffs attempted to show it. After the loss of the boat the defendants wrote to the plaintiff as follows, under date of the 29th February 1829. "We trust that Mr. Briggs will have convinced you that no blame can attach to us for not having insured your interest in the steamboat Hercules. A reference to the account current of the steamboat Hercules rendered you on the 30th May last and to your own account with us to the same date will satisfy you that all insurance on your account ceased on the arrival of that boat with you. On her return to this place we advised Mr. T. W. Bakewell that unless instructed to do so we did not feel authorised to insure either on your account or his, and since then your accounts have been rendered accordingly without any remarks from you, which led us to the conclusion when the accident happened that you as well as Mr. B. were fully covered."

J. K. West a witness for defendants states that he was secretary to the Louisiana State Insurance Company in December 1827 when the defendants insured their interest amounting to eight thousand dollars in the Hercules and omitted to insure for plaintiff for the first time. Witness observed to the person applying that the previous policy covering insurance

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for the other owners had also expired, and that one of the defendants replied they had no instructions to effect insurance to cover any other interest than their own.

The district judge was of opinion that the previous circumstances of the case made it the positive duty of the defendants to insure for the plaintiff, and that defendants have not shown sufficient reasons to excuse or exonerate them from this duty. The decree must therefore be for the plaintiff for the amount which had been previously insured; less one year's premium and commission. Judgment rendered accordingly. The defendants appealed.

Pierce for the plaintiff. Whether the plaintiffs are agents or partners they are liable for not doing for others what they would do for themselves, and should be bound to exercise the same care of the property entrusted to their charge as of their own.

Eustis for the defendants; relied on the ground that the defendants having notified the plaintiff by their account current that they had discontinued the insurance of his interest in the steamboat, were thereby exonerated.

2. The defendants were gratuitous agents and not responsible according to the strictness of the law of principal and agent.

MATHEWS, J., delivered the opinion of the court.

In this case the plaintiff claims remuneration for loss and damage which it is alleged he had suffered by the negligence and misconduct of the defendants, his agents, in not insuring his interest in a certain steamboat called the *Hercules*, which was employed in towing vessels between New-Orleans and the Balize. He obtained judgment in the court below from which the defendants appealed.

The principal facts of the case are as follows. The boat in question was owned in unequal portions by the defendants, the plaintiff, and one Bakewell. The interest of the plain-

tiff was estimated at five thousand dollars. Sometime in the year 1826, this boat commenced its employment in the towing business between the places above stated. At that time the interest of the plaintiff was insured by the defendants, who acted as his agents; and this was done at his request. The policies were regularly renewed from six months to six months, from the commencement of the insurance until some time in the summer of 1827, when the boat was sent to be repaired at Shippingport in Kentucky. Previous to her leaving New-Orleans she was insured on this voyage. After being repaired she was sent down the river and commenced the business of towing vessels in pursuance of the use to which she had been formerly appropriated, and was totally lost by the perils of the river on the 26th of December, 1828. After the return of the boat to New-Orleans in 1827, being then repaired, the defendants neglected to insure the interest of the plaintiff, although they took care to insure their own.

The judgment of the District Court as based on these facts is assailed by the counsel for the appellants on two grounds: 1. That they were not the agents of the plaintiff's at the time of the alleged negligence. 2. That if they may be considered as his agents they gave him notice of their having discontinued to insure his interest in the boat, and that he acquiesced in the latter course of conduct.

Neither of these propositions is supported by the evidence in the cause. They were his agents to effect insurance; and, indeed as related to the management of the boat during the time she was employed in towing voyages below New-Orleans and the mouth of the river from 1826, to the summer of 1827, when she was sent to Shippingport for repairs; and in that voyage they assumed the agency to insure the interest of the plaintiff. When did they cease to be his agent? According to our conclusions from the testimony, never until the boat was lost; at least so far as their agency related to effecting insurance. How did they give notice to the co-proprietor that they had ceased to protect his interest by insurances while they were so careful of their own? Not by letter, not by verbal message. But the counsel argues that he had at

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Where a mercantile firm is part owner of a steamboat and acts as the agent of a co-proprietor at a distance to insure his interest therein, and afterwards discontinues such insurance without any instructions from him, and the boat is lost, the firm is liable for the amount of such interest uninsured.

And the circumstance that the firm rendered an account current to the co-proprietor before the loss of the boat in which the charge of the premium for insurance was omitted and no objection made, will not be considered as notice of a discontinuance of the agency to insure so as to excuse the party from his liability.

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least presumptive notice by the omission of the charge for a premium in one of their accounts current sent to him at Louisville. As argued on the other side, the plaintiff might have overlooked the omission; for a man's attention is not readily drawn to things which do not appear. *Non-entities* are not apt to be the subject of reflection and thought in the mind of any person. Let us however suppose, that he did notice this omission or difference between this account and others which had been previously rendered, what may have been his conclusion? The most natural to our minds would be this; my friends and agents have neglected to charge me with the customary premium of insurance. This omission can easily be corrected at some future time. But surely they have not been wholly regardless of my interest entrusted to their charge and care. They have not been such unfaithful agents as to leave me to the risk of losing five thousand dollars, and at the same time be careful to protect themselves against loss whilst we were all interested in the same vessel, periled by fire, by steam, and by hurricanes.

We are unable to discover any thing in the prominent features of this case calculated to distinguish it from that of *Ralston vs. Barclay et als* 6 *Martin* 649.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

IN THE MATTER OF PERCY vs. MILLAUDON ET ALS.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where the appeal bond at the time of filing the appeal does not contain the names of the obligees or the style of the suit and judgment appealed from, it is insufficient, and the appeal will be dismissed.

If an appeal bond was null at the time the appeal was brought up, it cannot be made valid afterwards by filling up the blanks. EASTERN DIS.
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A tableau of distribution of 1076 shares of stock belonging to all the stockholders of the late Planter's Bank, as well plaintiffs as defendants in the suit of *Percy et als. vs. Millaudon et als.* 3 La. Rep. 568, was presented for homologation: the said stock amounting to ten thousand two hundred and thirty-six dollars, with interest thereon and bank notes in the hands of Millaudon and others, amounting to eight thousand five hundred and eighty-eight dollars and forty cents, making an aggregate of capital to be divided of twenty-two thousand four hundred and ninety dollars 27 cents. From this it is proposed to deduct four thousand nine hundred and ninety dollars for attorney's fees, commissions of agents, advertising, homologation of tableau, &c., leaving a netbalance of seventeen thousand five hundred dollars, the amount of said shares to be divided among the stockholders.

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This tableau was opposed by about thirty of the stockholders and owners of five hundred and seventy-nine shares of the capital stock of said bank, on the ground that they being defendants in this matter, were charged conjointly with the plaintiffs for the fees and commissions and other expenses incurred in the proceedings against them, and for which they are in no manner bound. They pray that these sums be deducted from the amount of capital, accruing to those who employed said agents &c., and that the sum of six thousand three hundred and fifteen dollars as interest from the 8th April, 1826, on their share of the capital stock be allowed them, and that the tableau be amended in this respect.

The opposition was overruled, and Millaudon, Lanna, and Abat appealed.

The appeal was made returnable to the 4th Monday in April, 1834, and the record filed accordingly.

The appeal bond as it comes up in the record, is signed with the names of the appellants by their attorney on record, and by the surety in person; but the name and style of the

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suit and judgment appealed from, is left blank, as also the names of the obligees intended by the bond.

Hennen and Barton, for the appellees moved to dismiss the appeal, because it was not made returnable on the first day of the April term, instead of the fourth Monday, &c., and finally that there is no appeal bond as required by law.

Macready, for the appellants contended, that the appeal should not be dismissed, but that a *certiorari* should be awarded to make the record perfect. The defect in the bond is a clerical error which can be corrected by sending the record back to the lower court.

BULLARD, J., delivered the opinion of the court.

The appellees move to dismiss the appeal in this case, on several grounds, and among others that there is no appeal bond. The copy of a paper purporting to be a bond in the transcript does not contain the names of any obligees, nor does it state in what suit it is given.

Where the appeal bond at the time of filing the appeal does not contain the names of the obligees or the style of the suit and judgment appealed from, it is insufficient, and the appeal will be dismissed.

In answer to this objection, the counsel for the appellants has produced the original bond annexed to the petition of appeal, in which the names of the appellees are inserted and the other blanks filled up with the style of the suit, and reference to the judgment rendered in this case. It is, however, admitted that the blanks were filled after the transcript was filed in this court. The clerk certifies that the copy in the transcript is a true copy of the bond at that time. We can only inquire whether the bond was at the time the appeal was taken, such a one as the law requires. The Code of Practice requires that the bond should be in favor of the appellees, art. 575. A blank bond is not sufficient. If the bond was null at the time the appeal was brought up, it cannot be made valid afterwards by filling up the blanks without the consent of the appellees.

If an appeal bond was null at time the appeal was brought up, it cannot be made valid afterwards by filling up the blanks.

It is, therefore, ordered, adjudged and decreed, that the appeal be dismissed with costs.

PERROTIN vs. CUCULLU.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where an agent has charge of the vessel of his principal with a general authority to procure a cargo of goods suitable for a particular market, and draws and negotiates a bill of exchange to raise funds for this object, the principal will be bound to pay it, although the agent had no special power to this effect.

Even without a specific power the agent can bind his principal by drawing bills and signing notes when it is necessary, to raise funds to carry into effect the main object of the agency.

The plaintiff residing at Kingston in Jamaica, instituted this suit against the defendant residing in New Orleans on the following bill of exchange: "Kingston, Jamaica, May 11, 1831.

"Exchange for one thousand eight hundred dollars.

"Ninety days after sight this my first of exchange, pay to the order of Louis Perrotin, Esq. the sum of one thousand eight hundred dollars, value received, and place the same with or without further advice to the account of yours, &c.

"A. Lamerlere."

"To Henry Thompson, Esq. Baltimore."

The petition charges that Lamerlere was the agent of Seraphin Cucullu for conducting and managing the concerns of said Cucullu, in relation to the brig Seraphin and her cargo, and that he applied to the plaintiff in this behalf for certain sums of money which were advanced to him as the agent of the defendant. That in part payment of said sums so advanced, the agent drew the bill of exchange now sued on, and delivered it to the plaintiff who negotiated it, but which was protested for non-acceptance and taken up by him, with one hundred and forty-four dollars for return premium, twenty-seven dollars for exchange premium, and five dollars for costs of protest and postage. That demand of payment has been made on the defendant for whose

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account said bill was drawn, who refuses to pay the same. The plaintiff prays judgment for the aggregate sum of one thousand nine hundred and seventy-six dollars with interest and costs.

The defendant plead a general denial.

Bouny, witness for plaintiff states, that when Mr. Lamerlere was going to the West Indies as the agent of the defendant, he gave him a letter to his brother-in-law in the island of Cuba. That after the return of Mr. Lamerlere to this city, witness received the draught sued on from the plaintiff for collection and presented it to Mr. Lamerlere, who stated that he had only acted as agent of the defendant in drawing it. Witness applied to defendant for payment, who refused, saying Lamerlere had gone beyond his instructions; that the brig *Seraphin* on the voyage in which Mr. Lamerlere went was commanded by Captain Boissier.

Lamerlere was dead and his signature to the draft admitted.

Daron, witness for plaintiff; states that he was in the employment of the plaintiff as clerk when the brig *Seraphin* arrived at Kingston and was consigned to the plaintiff by Mr. Lamerlere as supercargo. That Mr. L. stated that he required a quantity of dry goods for a voyage he was about making to the Spanish Main, and requested the plaintiff to procure them and he would give him a draft either on New Orleans or Baltimore for the amount. That Mr. L. represented himself as the agent of the defendant, and the captain of the brig *Seraphin* stated the same thing. The plaintiff procured the goods on his own credit, and shipped them on board the defendant's brig as requested by the agent, who drew the bill sued on and delivered it in payment.

Authentic copies of three letters written by the defendant to A. Lamerlere shewing that the latter was his agent to procure a cargo for the brig, and giving him full power to that effect, were annexed to the deposition of this witness and read in evidence by plaintiff.

The defendant produced in evidence a general power of

attorney from the defendant to Lamerlere, to proceed to Baltimore and act his general agent to buy and sell goods and produce, to collect and pay debts, &c., and to manage and transact the business of the defendant throughout the Union in whatever way that in his opinion was best calculated to promote the interest of his principal. No mention is made in this power of his being appointed super cargo of the brig Seraphin.

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The documents and letters showed that the brig had taken in a cargo of flour at Baltimore, and proceeded with Mr. Lamerlere as supercargo on board, to the West Indies, and on his arrival at Kingston in Jamaica, the transaction on which this suit is founded took place.

After it was closed and a new cargo procured, the vessel proceeded to the Spanish Main, and was destroyed by the Spanish fortress in the harbor of Porto Cabello. A suit was instituted and then pending against the New Orleans Insurance Company for the insurance on the value of the said brig and cargo.

The defendant in a letter to Thompson the drawee of the bill sued on, dated August the 6th, 1831, stated that if the insurance of the goods which were lost in the destruction of the brig Seraphin was recovered, it should be applied to the payment of the draft. This was exhibited by the plaintiff's counsel as evidence of a conditional promise to pay, and as a ratification of the authority to draw the draft.

The district judge was of opinion, that by the rules of the commercial law the defendant was bound by the acts of his agent in this case, and gave judgment against him for the amount of the bill, together with damages and costs, amounting to one thousand nine hundred and seventy-six dollars, and legal interest from the time of the demand of payment from defendant; the latter appealed.

Canon for the plaintiff.

Strawbridge and *Hoa* for the defendant.

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MATHEWS, J., delivered the opinion of the court.

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This was an action in which the defendant is sued as the drawer of a bill of exchange. Judgment was rendered in favor of the plaintiff in the court below, from which the defendant appealed.

The bill was drawn by one Lamerlere as agent for the defendant in favor of the plaintiff, on Henry Thompson of Baltimore, was endorsed by the payee, and after protest for non-acceptance, was taken up by the latter, who paid the amount to the holder, together with all legal costs and damages occasioned by the protest. The defence is want of authority in the person who assumed the agency to bind his principal.

The evidence of the case consisting principally of letters and other written documents which passed between the parties to the transaction, shows that Lamerlere was fully authorized by the defendant to represent him in the settlement of a variety of matters relating to his commercial business; and among other affairs had charge of a brig called the Seraphin as supercargo and agent, for which he was empowered to procure a cargo of goods suitable for the markets of the Spanish Main, for and on account of the defendant. To effect this purpose he drew the bill as above stated in order to raise funds. The correspondence between him and his constituent shows an unbounded confidence on the part of the latter, to whom he stood in the relationship of father-in-law. It is true that no specific power seems to have been given to the agent to bind his principal by drawing bills or signing notes. But it was necessary that money should be raised for the purpose of carrying into effect the main object of his agency. The brig was laden with flour at Baltimore, and went from thence to Kingston in Jamaica. This article was on her arrival heavy and dull of sale, and consequently could not in any reasonable time, afford the means of completing the principal object of the voyage by the purchase and transportation of merchandise suitable for the trade of Spanish America. Under these circumstances

Where an agent has charge of a vessel of his principal with a general authority to procure a cargo of goods suitable for a particular market, and draws and negotiates a bill of exchange to raise funds for this object, the principal will be bound to pay it although the agent had no special power to this effect.

Even without a specific power the agent can bind his principal by drawing bills and signing notes when it is necessary to raise funds to carry into effect the main object of the agency.

the agent certainly could not have met the views and complied with the intentions of his constituents in any manner more favorable to his interests than by raising funds on his credit. This course of conduct was adopted as the only means by which the important object of his trust could be brought to a favorable issue by the agent, and it might be questioned whether the assumption of power in this respect even without express authority, did contravene the 2966th article of the Louisiana Code; for it was an act contributing to the main purpose of the grant of power. Be this, however, as it may, we are of opinion that Cucullu's subsequent agreement to pay the bill out of a particular fund, should that fund be available, amounts to a sanction and ratification of what had been done by his agent.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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APPEAL FROM THE COURT OF THE FIRST DISTRICT.

It is no bar to the plaintiff's right to recover the full amount of his claim that he presented an account for a smaller sum to avoid litigation and obtain a prompt settlement of his demand.

The clause of the article 3499 of the Louisiana Code, which provides that actions of workmen, laborers, and servants for the payment of their wages, shall be prescribed in one year, does not apply to an action for work done under a specific contract or by the job.

The plaintiff alleges that he was employed by the defendant to put up a steam engine for the Louisiana Sugar Refinery, for which the latter agreed to pay him three hundred

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and fifty dollars, and furnish all the parts and materials without delay. That said agreement took place in June, 1832, and the plaintiff immediately commenced putting up the work which he completed the beginning of November, 1832. He charges that in consequence of the failure of the defendant to furnish him with the materials and parts of the engine, and for extra work done on the fly wheel by himself and another hand, they were delayed eighty-two days, which he estimates at three dollars and fifty cents per day, amounting to two hundred and eighty dollars, which sum added to the price agreed on for putting up the engine amounts to six hundred and thirty-seven dollars for which he prays judgment. The defendant pleaded the general issue, and that the plaintiff owed him two hundred dollars, the price of a horse loaned to him, and by his negligence foundered and lost; and further the work was so negligently and badly done, that the plaintiff is entitled to no compensation therefor. He prays judgment against the plaintiff for two hundred dollars as the value of the horse lost by him and for costs.

In a supplemental answer the defendant pleads the prescription of one year.

The account sued on is dated the 1st of November, 1832, and the petition was filed the 7th November, 1833.

The witnesses called by the plaintiff fully prove the performance of the work as alleged by him. The horse charged to the plaintiff in the answer, was proved to be worth about fifty or sixty dollars. The plaintiff used him to ride when attending to the work at the sugar refinery.

Stanton, a witness for defendant, his brother-in-law and clerk in his employment, states that the plaintiff presented his account against the defendant when the work was finished, and charged only three hundred and sixty dollars. That the defendant offered to pay it, if plaintiff would deduct sixty dollars, and that the sugar refinery was to pay for the extra work; that the horse which plaintiff used while attending to this work died soon after he was returned to the defendant.

The district judge after making some deductions from the account sued on, gave judgment for four hundred and ninety dollars and costs, from which the defendant appealed.

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Preston for the plaintiff.

1. The facts of the case as proved by the witnesses fully support the judgment of the court.

2. The plea of prescription is unfounded and cannot prevail. The work was not done for days, weeks, or month's wages, but for a specific sum under a particular contract.

3. The prescription of the wages of workmen does not apply to a contract with a workman to perform work by the job as where he undertakes to build a house, &c.

Lockett for the defendant.

1. The plaintiff cannot recover in this suit as the evidence shows that he made out his account for the same work and claimed only three hundred and sixty dollars, and made no claim for lost time.

2. The claim is prescribed by the lapse of one year under that clause of the Code relating to the payment of the wages of workmen, laborers, and servants, &c. *La. Code, art. 3499, 3500. 8 Mar. N. S. 492.*

BULLARD, J., delivered the opinion of the court.

This suit was instituted to recover of the defendant the sum of three hundred and sixty dollars, under a contract to put up a steam engine, and for additional or extra work done in consequence of a change in the plan of the work by the defendant. The defendant first denies that he owes any thing, and then avers that the plaintiff owes him two hundred dollars for a horse borrowed of him, which was badly used, was foundered and died. He next alleges that if ever he did employ the plaintiff to do any such work, it was so badly and negligently done that the plaintiff is not entitled to be paid therefor. He finally pleads the prescrip-

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tion of one year and relies on articles 3499, 3500 of the
La. Code.

There was judgment in favor of the plaintiff for four hundred and ninety dollars, and the defendant appealed. The evidence fully supports the judgment of the court. The contract was proved and that the work was well done. The delay and extra work were occasioned by the defendant himself. His counsel relies on the fact proved by one of the witnesses, that the plaintiff made out an account in which no charge was made for extra work. We think this ought not to prejudice his rights. It appears that he made out the account in that way at the suggestion of the defendant and in order to avoid litigation. It was but a conditional offer to leave the question of extra work open until the defendant should be paid by the sugar refinery. We cannot regard it as a release. If the defendant had paid the account as made out and presented, it might have varied the case.

It is no bar to the plaintiff's right to recover the full amount of his claim, that he presented an account for a smaller sum to avoid litigation and obtain a prompt settlement of his demand.

The clause of the article 3499 of the *La. Code* which provides that actions of workmen, laborers and servants for the payment of their wages shall be prescribed in one year, does not apply to an action for work done under a specific contract or by the job.

The article of the code relied on does not sustain the defendant. That article provides that the action of workmen, laborers and servants for the payment of *their wages* shall be prescribed in one year. This action is not for wages, it is for work done under a specific contract. In the case of *Nichols vs. Hanse et al.* 8 N. S. 492, to which we are referred by the defendants counsel, the plaintiff was employed by the month at certain monthly wages agreed on by the parties, and this court held that the prescription of one year applied. But in this case it is totally different, the plaintiff was an undertaker of a job.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

HUBERT *vs.* AUVRAY.EASTERN DIS.
June, 1834.HUBERT
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AUVRAY.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

In a controversy between two persons making claim to an office, when it is shown that it is worth more than three hundred dollars a year, the Supreme Court has appellate jurisdiction of the case.

A writ of *quo warranto* is not the remedy to procure a commission from the mayor, which is withheld.

If a person claiming the right to hold an office under the corporation of New-Orleans, applies to the mayor for his commission and it is refused, his remedy is by writ of *mandamus*.

The petitioner alleges that he was duly appointed by the mayor and city council of New-Orleans, syndic and commissary of police for the upper banlieu in said city, in May 1833, and in conformity to the ordinance of the 13th June 1813; that he gave bond for the faithful performance of his duties with John H. Holland his surety; and that he has faithfully performed the duties of his office ever since. He alleges further that the defendant claims and has usurped his right to said office without color of right or authority, and presumes to exercise the duties of syndic to the great prejudice and infringement of the rights of the petitioner; wherefore he prays for a writ of *quo warranto* commanding said Pierre Auvray to show by what authority he claims to exercise the duties of said office, and that he be prohibited from the exercise thereof in future, and declared not qualified to fill such office.

The judge ordered the writ to issue in accordance with the prayer of the petitioner, and ruled the defendant to answer to the petition.

The defendant after reserving the benefit of all exceptions to this mode of proceeding, pleaded the general issue; and that he was the lawful syndic and commissary of police for the upper banlieu or liberties of the city of New-Orleans,

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and that the value of said office exceeds three hundred dollars.

In a supplemental answer the defendant filed his peremptory exception or plea to the jurisdiction of the court, on the ground that the legislature has granted the exclusive right to the corporation of New-Orleans to determine the validity of the elections of its members.

The plaintiff offered in evidence the bond executed by him on the 3d of June 1833, before Felix De Armas, the notary public of the corporation, with J. H. Holland as his surety for the faithful performance of the duties of his office.

It appeared from the evidence, that the plaintiff was nominated by the mayor on the 22d May, and confirmed by the council on the 29th., as syndic &c., and that he executed this bond on the 3d of June following, in the office of the notary of the corporation, and that his surety signed a few days afterwards. The mayor from the press of business omitted to sign said bond until after the ten days had expired, within which by a resolution of the city council the bond is required to be executed. The plaintiff neglected to call on the mayor for his commission. After the expiration of the ten days from his former appointment, the mayor concluding that the plaintiff was not regularly in office, re-nominated him to the city council. He neglected to avail himself of the re-nomination. On the 10th of July following, the present defendant was nominated by the mayor to the same office and confirmed by the council. Having complied with the requisites of the law, he now claims the right to exercise the duties of said office.

The evidence shows there is an annual salary attached to said office of one thousand dollars.

The parish court overruled the exception to the jurisdiction on the ground that it was only in the election of mayor, recorder and aldermen that the corporation were the ultimate judges. That this was not the case of an election, but an appointment to office by the mayor and city council.

The court considered that in the appointment of the plaintiff by the mayor and city council, and after having furnished his bond with security within the ten days as required by the

resolution of the city council, dated 22d of February 1830, he was to all intents and purposes syndic and commissary, &c.; that his removal was the result of error, and is null and void. Judgment was rendered forbidding Auvray to interfere in the duties of said office and to pay costs.

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The defendant took a rule for a new trial, on the ground that, "the judgment is contrary to law," which was discharged, and the defendant appealed.

Grailhe, for the plaintiff and appellee.

1. Contended that by the 4th article of the constitution of the state, the Supreme Court had no jurisdiction of this case, it not being a demand for money or property having a value attached to it.

2. There is no sum or valuable amount in contest to give appellant jurisdiction.

Eustis, for defendant.

1. The mayor and city council being the appointing power, have the power to remove from office.

2. The appellee was virtually removed by competent authority, and the rejection of his renomination was conclusive as to the intentions and acts of the appointing power. Vide proceedings of the session of the city council of the 10th July 1833.

3. The appointment of Auvray was in fact a removal of the plaintiff.

4. The acts of the mayor and council of the 17th of July 1833, are conclusive as to the rights of the defendant, and this court cannot inquire into the legality of the acts of the city council, as to the removal of an officer of the corporation, (when those acts are legal in point of form,) on the return to a *quo warranto*.

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MARTIN, J., delivered the opinion of the court.

The defendant is appellant from a judgment forbidding him to exercise the functions of syndic and commissary of police in the upper liberty of the city of New-Orleans.

The dismissal of the appeal has been moved for on the ground of the matter in dispute being an office and not any thing susceptible of valuation so as to appear of the value of three hundred dollars which is the minimum of the matters of which this court has jurisdiction.

In a controversy between two persons making claim to an office, when it is shown that it is worth more than three hundred dollars a year the Supreme Court has appellate jurisdiction of the case.

The record shows that a salary of about one thousand dollars a year is annexed to the office; this certainly gives us jurisdiction.

On the merits, the plaintiff was appointed to the office and within ten days, had an act of suretyship prepared by the notary of the city, which he subscribed, but the testimony shows the surety did not sign until a few days after the principal; it does not appear whether he did so within the ten days required by law. The clerk of the notary sought the mayor in vain for several days to procure his signature to the act. The mayor desirous to give the plaintiff a second opportunity renominated him. The plaintiff not having availed himself of the second nomination, the defendant was nominated, gave timely surety and was commissioned.

A writ of *quo warranto* is not the remedy to procure a commission from the mayor, which is withheld.

The plaintiff brought the present suit in the form of a writ of *quo warranto*.

If a person claiming the right to hold an office under the corporation of New-Orleans, applies to the mayor for his commission and it is refused, his remedy is by writ of *mandamus*.

It does not appear that the mayor was ever applied to by him for a commission. If he had and had improperly refused one, the remedy would have been by a writ of *mandamus* to that magistrate to commission the plaintiff.

The plaintiff ought to attribute his disappointment to his own laches.

It is therefore ordered, adjudged and decreed, that the judgment of the Parish Court be annulled, avoided and reversed, and that there be judgment for the defendant, with costs in both courts.

L'HOMMEDIEU *vs.* PENNY'S EXECUTORS.EASTERN DIS.
June, 1834.L'HOMMEDIEU
*vs.*APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF NEW- PENNY'S EX'RS.
ORLEANS.

A note found among the papers of a factor at his decease, which had been taken in payment of the price of property sold for his consignor, belongs to the latter, and should be delivered up by the executors, or its proceeds if collected, without being mingled with the estate of the deceased.

The plaintiff who resides in New-York, alleges he consigned a quantity of lime to P. B. Penny, of New-Orleans, in the month of June 1832, which was sold on his account by the latter. Among the purchasers was a Mr. Bosque, who gave his note payable to Penny at five months for one thousand four hundred and twelve dollars and forty-four cents. That Penny died soon after, and E. W. Gregory and N. Harrington were appointed his executors, and took possession of his estate, and have collected the amount of Bosque's note and retain the same. The plaintiff claims the amount of said note as the *legal owner* thereof, and prays judgment against the executors jointly and severally for that sum with interest and costs. The executors pleaded a general denial; and that if said debt is established, the plaintiff be decreed to be an ordinary creditor and only entitled to his dividend *pro rata*, in case the estate of Penny proves insolvent.

It was admitted that Bosque's note was given to Penny for the purchase of lime, the property of the plaintiff, consigned to the former for sale on account of the latter; that the executors received the amount of said note.

The judge of probates was of opinion, that in pursuance of the article 3215 of the *Louisiana Code*, even if the estate of Penny turned out to be insolvent, the plaintiff would be entitled to the entire proceeds of the note which had been given in payment of the price of his property. Judgment was rendered accordingly against the defendants in their capacity of executors of Penny's estate, for one thousand four

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hundred and twelve dollars and forty-four cents, with interest from the time it was received.

The executors appealed.

Slidell, for the plaintiff.

1. The testator was the factor of the plaintiff, and Bosque's note was received for the price of property consigned by the latter and sold on his account.

2. The judgment of the Probate Court is fully sustained by the 3215th article of the *Louisiana Code*. This article is in fact merely a recognition of a general principle of law to be found in the jurisprudence of every country. *Vide case of Clay vs. His Creditors*, 9 Mar. 523.

Locket, contra:

1. Contended that the plaintiff must be viewed as an ordinary creditor of the estate administered by the defendant and paid accordingly. The court below erred in giving judgment that this claim be *paid as a privileged debt*.

2. The article of the *La. Code* cited by the judge is in conflict with his judgment. It applies only to cases of bankruptcy.

3. The 3152d. article of the *Code* provides that "privilege can be claimed only for those debts to which it is expressly granted in this *Code*." No express privilege can be shown for this claim.

MARTIN, J., delivered the opinion of the court.

Penny, to whom the plaintiff had sent a consignment of lime, having sold it on a credit to Bosque, had taken the note of the latter for the price thereof. The executors finding this note among Penny's papers, collected it, imagining that the plaintiff could only be considered as a creditor of the estate for its amount. The present suit was instituted to enforce the plaintiff's right to have the amount

of the note separated from the estate of the deceased and paid over to him. This was decreed by the Court of Probates, and the executors appealed.

The judgment of the Court of Probates (the plaintiff's allegations being admitted,) appears to us perfectly correct. The deceased was the plaintiff's factor. The note belonged to the former, and ought to have been returned to him without being mingled with those of the deceased: so must the proceeds.

It is ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed with costs.

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A note found among the papers of a factor at his decease, which had been taken in payment of the price of property sold for his consignor, belongs to the latter, and should be delivered up by the executors, or its proceeds if collected, without being mingled with the estate of the deceased.

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APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT.

If minors after coming of age, either expressly or tacitly approve of the alienation of their property while under age, they cannot sue for its recovery.

A receipt given by the widow to a purchaser of property held in community between her and her children, is admissible in evidence to show payment of the price, against the latter in a suit to recover back the property as having been illegally sold.

A verdict made up from the evidence of the case, not manifestly wrong, will not be disturbed.

The plaintiffs allege that they are the heirs and legal representatives of Charles M. Huset who died in the parish of Lafourche Interior, in 1812, leaving a widow Marie

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Haché and the aforesaid heirs, his legitimate children, most of them minors; that he owned and possessed at his death a plantation on bayou Lafourche, a negro woman, slave and her two children, all of which were sold at public sale by order of the Court of Probates of said parish, in September 1812; that the sale is illegal because the widow never took the oath as natural tutrix of the minors; no under tutor was appointed, and no family meeting was held to deliberate and decide if it was for the interest of the minors to sell said property; that the terms and conditions of the sale were not advertised according to law; that the widow and natural tutrix became a purchaser of the property sold, by reason of all of which defects the sale is null and void: that the defendants Pierre Lefebvre, J. B. Guidry and F. Ayon are in possession of said property: wherefore they pray that said defendants be declared to be wrongfully in the possession thereof and that it be decreed to belong to them, and that the defendants deliver it up accordingly, &c.

The defendant Lefebvre, in his answer pleads a general denial and expressly denies the heirship of the plaintiffs, and alleges that he is the true owner of the plantation by a just title, having purchased it at the probate sale of Charles Baird's estate, the 10th of January 1829, who had acquired title to it by authentic act from Jacques Verret, passed the 2d March 1819, who had purchased it at the probate sale of the estate of the ancestor of the plaintiffs in September 1812. This is the sale now complained of. The defendant Lefebvre, further alleges that he and those under whom he claims have possessed said property in good faith and under a just title ever since the 21st September 1812; and he calls his vendors in warranty, &c.

The defendant Guidry, pleaded the general issue, denied the heirship of the plaintiffs, and alleged that he derived title to the portion of the property claimed from him by purchase from one Martin, who acquired his title by purchase, at the probate sale of the estate of Marie Haché, widow of said C. M. Huset, made in December 1819, and has possessed in good faith, &c.

Ayon pleaded a general denial, and alleges that he is owner of the slaves claimed, and acquired title to them by authentic act and purchase from Marie Haché in 1816, &c.

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Guidry and Ayon in amended answers call their vendors in warranty; the latter alleges, that as he purchased from plaintiff's mother, and who was also their natural tutrix, and part owner of the property, that they are bound to him in warranty, &c.

Much evidence was produced on the trial of this cause, which was submitted to a jury, who found a verdict for the defendants. From the judgment of the court rendered thereon, the plaintiffs appealed.

Taylor, for the plaintiffs and appellants.

1. The plaintiffs are the legal heirs and representatives of the persons under whom they claim.

2. All the heirs of Charles M. Huset were minors on the 21st of September 1812, and the probate sale of the land belonging to his succession, was absolutely null and void for the reasons set forth in plaintiffs petition. 3 *Moreau's Dig.* p. 132. 19. 21. *Civil Code*, p. 68, art. 57, 58. and 51, 53. 3 *Martin*, N. S. 324. *Nap. Code*, art. 457. *Pailleitt's note*, p. 157, art. 8 and 9.

3. It devolved on the defendants to show that the proceedings relative to the probate sale were regular. We produced the best evidence the nature of the case admitted of, to show that the legal formalities had not been observed, by presenting a copy of every thing on file in the parish judge's office relative thereto. 3 *La. Rep.* 78. 1 *Phillips on Ev.* (ed. 1820) 149.

4. A defective title does not form the basis for prescription. *Civil Code*, p. 488, art. 70. 4 *Martin* N. S. 212.

5. The title from Verret to Baird, dated 2d March 1819, is the first produced by Lefebvre, which is perfect in form, and the first produced by the defendant Guidry, is that from Michel Martin to himself, dated 28th of February 1820.

6. No prescription runs against minors. *Civil Code*, p. 486, art. 56; and of course the prescription of ten years is

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7. The plaintiffs, heirs of Charles M. Huset, sen., had a common and undivided right to the land sued for; and as the prescription of ten years could not run against those who were minors, it likewise can have no effect against the majors. *Domat, vol. 1, book 3, title 7, sec. 5, V.*

8. The exception of plaintiffs to the introduction of the quittance given by the widow of Huset, the father, to Jacques Verret by public act, passed before the judge of the parish of Lafourche Interior 8th of September 1815, was well taken, because she was not qualified as tutrix until the 1st of November 1816.

9. And if the exception should be decided to be well taken, the case ought not to be remanded for a new trial, as all the evidence offered whether received or rejected is in the record.

——— for defendants.

BULLARD, J. delivered the opinion of the court.

The petitioners represent that they are the surviving children and heirs of Charles Mathurin Huset, deceased. That at his death they, and those whom they represent, were all minors, and that their father died seized, among other things, of a tract of land on the bayou Lafourche, and a certain slave called Isabella and her children. They represent that on the 25th of September 1812, the property was sold at auction, by authority of the Court of Probates, of the the parish of Lafourche Interior, and that the land is now in possession of the defendants Lefebvre and Guidry, and the slave in that of Ayon. They allege that the proceedings and formalities required by law, for the disposition and sale of the property of minors were not had and complied with previous to said sale; and particularly, 1st. that Marie Haché, their natural tutrix, did not take an oath as tutrix; 2d. that no under tutor was appointed; 3d. that no family meeting was called; 4th, that

the sale was not advertised according to law; and 5th. that their tutrix became a purchaser of a part of the property. They concluded by praying judgment for the land and slave and her increase.

The defendants specially deny in their answer the heirship of the plaintiffs, and generally the facts alleged in the petition. The defendant Lefebvre, further sets up his title to the land under a sale of the estate of Charles Baird, deceased, he pleads prescription, and calls in the heirs of Baird as warrantors. The defendant Guidry, also sets up title to another portion of the land, under a conveyance from Michel Martin, and they both claim the value of improvements made on the land. The defendant Ayon sets up title to the slaves under a conveyance made in the year 1816, by the mother of the plaintiffs, Marie Haché, and pleads prescription.

Amended answers were afterwards filed with the leave of the court, in which the defendants oppose to the plaintiffs the exception of warranty, alleging that they, the plaintiffs, are the heirs of their mother, who sold and was bound to warrant, and that the price paid for the property was received by, or went to the benefit of the plaintiffs; and then pray that in case of eviction, the plaintiffs may be condemned to refund the price paid by them. They aver that the plaintiffs by receiving the price have ratified the sales of which they complain.

The plaintiffs took a non-suit as to the defendant Ayon, and the cause as to the other defendants was tried by a jury, who found a verdict for the defendants, and the plaintiffs appealed.

The property possessed by Huset, father, at the time of his death, is presumed to have been of the community, and consequently one half belonged to the widow. It is therefore only in relation to the sale of one undivided half of the land that the plaintiffs had a right to complain.

It is not necessary to inquire whether the sale by authority of the Court of Probates in September 1812, was legal, or whether it was null and void for want of those forms and solemnities required by law for the sale of minors property.

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If minors after coming of age, either expressly or tacitly approve of the alienation of their property while under age, they cannot sue for its recovery.

This court has decided after solemn argument, that if minors, after arriving at the age of majority, expressly or tacitly approve of the alienation, they cannot afterwards sue for the property. *Chesneau's Heirs vs. Sadler*, 10 *Martin's Rep.* 726. *Minor's Grounse vs. Abat's Executors*, April term, 1834.

This approval on the part of the plaintiffs is expressly pleaded, and that issue was tried by a jury who found it in favor of the defendants. A mass of evidence was submitted and comes before us on the record, to show that the plaintiffs had given receipts for balances due them from the estates both of their father and mother. It is clear that if they have become heirs unconditionally of both their parents, they cannot recover.

The plaintiffs rely on a bill of exception to which our attention is called. The defendant offered in evidence a copy of a receipt given by the widow Huset to Jacques Verret for the last payment of the purchase money of the tract of land bought by him at the sale of the estate in 1812, which receipt bore date in 1815. Its introduction was opposed by plaintiffs on the ground that their mother was not duly qualified as their tutrix until after the date of the receipt. It was admitted and the plaintiffs took a bill of exceptions. We think the court did not err. The effect which such evidence should have was another question; as evidence of payment by a purchaser at the public sale to the widow who had a right to receive one half in her own right, it was clearly admissible.

The evidence both documentary and parole seems to have satisfied the jury and the court of the first instance, that the plaintiffs had received the proceeds of the sales of which they complain, and that they had become the heirs of their mother unconditionally, and consequently precluded from recovery by the exception of warranty. We are not enabled from an examination of the evidence to say that the verdict was manifestly wrong.

A receipt given by the widow to a purchaser of property held in community between her and her children, is admissible in evidence to show payment of the price, against the latter in a suit to recover back the property as having been illegally sold.

A verdict made up from the evidence of the case, not manifestly wrong, will not be disturbed.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

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Bonds or obligations entered into in states where the common law prevails, the right of the parties thereto must be determined by that system of jurisprudence.

In cases where a fund has been created or assigned to indemnify the surety the original creditor may in equity cause himself to be paid out of this fund which is in the nature of a trust for his benefit.

A bond creditor in chancery has the benefit of all counter bonds or collateral securities given by the principal to the surety.

So where A gave his bond of indemnity to B to secure him against his guarantee for C to D, on the failure of C, and B his surety becoming liable on his guarantee to D, and assigning his indemnity bond from A, to the creditors of D: *held*, that the latter can recover on it even before actual payment by B.

This suit was instituted in January 1832, by James G. King residing in the city of New-York, and appointed by the court of chancery in that city, *receiver* in a suit in chancery on behalf of the creditors of E. H. Nicoll, an insolvent debtor, to enforce the payment of a certain bond of indemnity executed by G. W. Murray of New-York, and the late Thomas L. Harman of New-Orleans to one Henry Payson of Baltimore, in the penalty of thirty thousand dollars, as an indemnity of said Payson against two guaranty bonds which he had given to Edward H. Nicoll, Henry W. Nicoll, and Francis H. Nicoll of New-York. Thomas L. Harman being dead the suit was brought here against the late Joseph Thomas the curator and tutor of Thomas L. F. S. and Charlotte G. Harman, minors and the children of Thomas L. Harman, deceased. Col. Thomas died soon after the institution of the suit and it was prosecuted to judgment against N. Cox as the tutor to said minors. The facts of the case are as follow:

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On the 5th April 1815, George W. Murray executed to Francis H. Nicoll, Edward H. Nicoll and Henry W. Nicoll, a bond and mortgage to secure the payment of ten thousand dollars on the 1st January 1828, interest thereon to be paid annually.

The mortgage was of certain white lead works erected on leasehold ground: they were destroyed by fire in 1824 and the mortgage thus became of no value. On 31st January 1818, Henry Payson, of Baltimore, entered into articles of agreement with the Nicolls to guarantee to them the annual payment of the interest and the eventual payment of the principal of said debt. The said Murray did also, on 5th October 1815, give a receipt to Edward Tyler, who, it appears, was a United States officer of ordnance, for a quantity of lead, for the return or repayment of which, said Nicolls became guarantee; said Payson did also on 31st January 1818 execute an instrument of counter guarantee to and in favor of said Nicolls in relation thereto.

On the 13th January 1821 an agreement was entered into between Murray and Payson, that if Murray within six months from 30th November 1820 by good and sufficient security, would indemnify and release Payson from all liability, damages, &c., by reason of said two instruments of guaranty, then Payson would release and discharge Murray from certain liabilities in said agreement particularly mentioned.

On 30th July 1821 G. W. Murray and Thomas L. Harman, of New-Orleans, entered into a joint and several bond to Payson for thirty thousand dollars. This bond recites the said two acts of guaranty of Payson verbatim and refers to the agreement of 13th January 1821, and further recited that this bond is intended as a compliance with that agreement. The condition of the bond is, that Murray will indemnify, save and keep harmless Payson against his liability under and by virtue of said instrument of guaranty, and from and against all sums of money recovered, awarded, adjudged, decreed and paid under and by virtue thereof, and of and from all actions, suits, judgments and decrees that may in due course of law be brought, prosecuted, obtained and awar-

ded against Payson for and by reason of said instruments of guaranty, and against all payments, loss, damages, costs, charges and expenses; or in case of the default of Murray to indemnify, save and keep harmless Payson in manner and form aforesaid upon due and sufficient notice by Payson to Harman of the default of Murray, if Murray or Harman or either of them, shall and do well and truly indemnify save and keep harmless Payson of and from the liability, sums of money, actions, suits, judgments, decrees, payments, loss, costs, damages, charges, &c., then the obligation to be void, otherwise to be and remain in full force and virtue.

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In May 1828, Francis H. Nicoll & Co. brought suit, in the Circuit Court of the United States for the southern district of New-York, against Payson, and judgment was rendered on the 20th November 1829 for thirteen thousand three hundred and ninety-nine dollars and fifty-eight cents, damages and costs on the mortgage guaranty.

In December 1829, F. H. Nicoll and E. H. Nicoll, survivors, &c., brought suit against Payson in the Superior Court of New-York, and in January 1830, judgment was rendered against Payson for one thousand four hundred and forty-one dollars and seventy cents damages and costs on the lead guaranty. We learn from this suit that F. H. Nicoll & Co. had been prosecuted by Tyler on their guaranty to him and judgment obtained against them. By the laws of New-York, which are in evidence, these judgments bear interest at the rate of seven per cent per annum after rendition till paid.

On the 26th July 1831, Payson by an act, reciting the judgments obtained against him by the Nicolls and that he was unable to satisfy the judgments otherwise than by assigning for the benefit of said E. H. Nicoll and F. H. Nicoll, or one of them, the counter bond from Harman: and also reciting that, by virtue of a bill in chancery, filed by Elisha Tibbits, the said Tibbits might be deemed the representative of the creditors of E. H. Nicoll who had become insolvent, and assigned his property for the benefit of his creditors, assigns to Tibbits the said counter bond executed to him by Murray and Harman, that the same may be prosecuted and the proceeds

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applied to extinguish the judgments obtained against him.

On the 27th July 1831, Tibbits makes an assignment to James G. King, the receiver appointed by the court of chancery in the chancery suit referred to, in trust to prosecute the bond and apply the proceeds as the court shall direct. To a petition alledging these matters and claiming the penalty of the bond from the heirs of Harman, there is an answer of general denial. Besides the documentary evidence above referred to, there is proof of notice from Payson to Taylor at that time, viz.: the 1st May 1826, the tutor of the minor children of Harman of the suits brought against Payson and the refusal of Taylor to interfere. The evidence of G. W. Murray proves that when Harman became counter security to Payson, Murray made to him a conveyance of the white lead works in order to secure him.

Murray also proves notice to Taylor, that Harman's estate would be called upon for the indemnity, and that suits had been brought against Payson. Murray stopped paying interest on the debt in 1824. Payson testifies that, to procure a counter indemnity against his own suretyship to the Nicolls, he released a claim of thirty-seven thousand dollars, which he had against Murray. That he had never called on Murray to comply with the requisitions of the indemnity bond of 30th July 1821, not supposing that he was authorised or required so to do. That Murray was a bankrupt in 1820, has been so ever since, and is so at this time. Payson never paid any thing to the Nicolls.

There is the further testimony of John Rathbone who was well acquainted with the parties and these transactions; that Harman in the spring or summer of 1821 transmitted to him from London a power of attorney to execute such a bond as is above described in favor of Payson, but that he refused to do it: that afterwards when Harman came to New-York from London he found fault with him for not executing the bond, and told him that he, Harman, had executed it. That in the winter preceding the July when said bond was executed, he, Rathbone saw Harman in Paris, who told him that Murray had applied to him, Harman, to assume upon himself the res-

possibility of Payson for Murray. That Rathbone cautioned and remonstrated with Harman against doing so, but Harman stated he was under obligations to Murray and wished to assist him, and mentioned the amount to which he was willing to go in his responsibility: he does not recollect the amount, but when he received the power of attorney to execute a bond to the extent of thirty thousand dollars, he concluded it was beyond the limits which Harman had mentioned to him in Paris, and, on that account declined executing the bond. In Paris, Harman stated to Rathbone, that he was willing to lose a certain sum which he named for the said Murray; that Harman knew the risk he ran in executing the bond. This witness also states that Murray and Payson are insolvent. Harman left Louisiana in the spring of 1820 and has not been here since.

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The following passage in the will of Harman is also in evidence.

"After my decease to prevent litigation or disputes, I think it necessary to state, that having become the purchaser of the white lead manufactory in Broadway in this city, with the sole motive of serving my friend Mr. George W. Murray, I hereby will and bequeath to my said friend the whole free and undisputed possession of the said white lead manufactory and all its appurtenances to his sole use and benefit during his life, and at his death the same to revert to my children, or such of them as may be then living in equal proportions, provided however, nevertheless, that he the said George W. Murray shall continue to carry on the said manufactory of white lead without calling on my executors or administrators for any further advances than those already made by me, and that he shall also arrange and provide for the payment of a bond for the sum of ten thousand dollars due to Messrs. Nicolls in the year 1827 or '28 as the case may be, as also for one other claim for the sum of about five thousand dollars due for lead borrowed from the United States for which a suit is now pending."

It is admitted that the common law governs at the place

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where the contract sued on was made and intended to be executed; and that the books of it are evidence of such law.

The defendants pleaded the general issue.

The plaintiff claimed the right to recover on two grounds: *first*, that where collateral security is given to a *surety* it results in favor of the person intended to be *secured*: that in this case the Nicolls' were the creditors intended to be secured and under the circumstances they have a right to pursue Harman: *second*, that Payson is entitled to an indemnity from Harman against the judgments rendered against him, and having assigned the bond with the right to prosecute for the benefit of the Nicolls', they are entitled to prosecute it for their own benefit.

The defendants insist that Payson could not prosecute this bond till he shows he has paid the debt; and if he be insolvent and unable and never does pay he cannot recover, nor the plaintiff as his assignee.

On the question of the right of the plaintiff to recover, the district judge observes that on examining the authorities cited, the court finds they are all cases where a fund or property was furnished by the original debtor to the surety, and the original creditor is in pursuit of this land or property on which he claims to have a lien. None of these cases go so far as to say, that, where there is a mere counter bond or personal obligation to the surety, the original creditor could bring suit against such counter obligor on his mere personal contract or covenant. To recognize such a rule in *extenso* would seem in contravention of the general principles that there is no equity against a surety and can be no action where there is no privity of contract. If this suit were brought to obtain the benefit of any fund or property given by Murray to Payson, or even to Harman, to secure them against the payment of the debt to Nicolls, it would come precisely within the authorities cited; and perhaps this case may fairly be brought within the reason of them by the evidence in the case. Murray proves that he made a conveyance of the white lead works to Harman as a counter security. Harman in his will states, that he bought those works to serve his

friend Murray; if he bought them he surely reserved a sufficiency of the price to pay a debt due on them, which he had himself guarantied. Murray was insolvent in 1820, and continued so ever since: the debt due the Nicoll's was secured by a mortgage on these works, and if he purchased them to secure himself against his indemnity, he will be considered as having received property from the principal debtor Murray as security, and his heirs are therefore bound to the Nicolls for the payment of that debt. This view of the matter would apply to both the debts due the Nicolls.

On the second point, viz: the right to recover as assignee of the indemnity bond of Harman, it is to be observed that the *casus contractus* has arrived. "Where the counter bond or covenant is given to save harmless from a penal bond, before the condition is broken, then if the penal sum be not paid at the day, and so the condition not preserved, the party to be saved harmless does by this become liable to the penalty and so is damnified, and the counter bond forfeited." *Salk. 197, p. 3.* In the present case there is a special damnification to Payson, viz: the judgments obtained against him. There can be no complete indemnity to Payson but in the payment of those judgments. It was an idle thing for Payson to give notice to Murray an insolvent; but Murray had full notice as his correspondence with Taylor proves. It is certain that Payson could recover on this bond, but if Payson was plaintiff and did recover, the court would not allow the money to go into his hands; it would see that money paid to the Nicolls the original creditors. Surely then there can be no reasonable objection why the Nicolls or their representative may not with the assent of Payson bring this suit for their own benefit and his protection. Payson obtained this indemnity at the sacrifice of a large debt due him by Murray. A decree in this case will be a complete indemnity to him; and he is entitled to it as against Harman and his heirs. There might seem a technical objection in this, that the assignment of Harman's bond appears to be received as a sort of satisfaction of the judgments against Payson; but the bond was forfeited when it was assigned, and defendants

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are only to be released from the penalty by fulfilling the real conditions on which it was given. Upon a review of the whole circumstances of this case, it is believed that a court of equity in a common law state, would under either and certainly under both heads of recovery put forward by plaintiff, decree to him against the defendants under the indemnity bond of their ancestor, the amount of the judgments rendered against Payson.

Judgment was rendered against the tutor for fourteen thousand eight hundred and forty one dollars and twenty eight cents, with interest at the rate of seven per cent. per annum, &c. The tutor appealed.

Slidell and Conrad for the plaintiff.

1. Payson could himself maintain an action on the bond against the estate of Harman without payment of the debt. By the express terms of the agreement Harman undertook to *indemnify, save and keep harmless from all actions, judgments, suits and decrees*, that might at any time thereafter be in due course of law, brought against Payson, and from all loss which he might *sustain by means of any judgement or decree*, that might thereafter be awarded against Payson for or on account of his guarantee for Murray's debt. Judgements have been obtained against Payson on his guarantee for Murray's debt, and the condition of the bond can only be complied with and Payson kept harmless by the satisfaction of those judgments. *La. Code 3026, Pothier, Traité des obligations No. 442. Griffith vs. Harrison. Salkeld 196, 7, Reps. of Dickey vs. Rogers 7 N. S. 588. Flower vs. Jones 7 N. S. 147.*

2. The assignment of Payson vested all his right in the Nicolls and their representatives: but without it they could have availed themselves of Harman's guarantee. Under the common law, when collateral security is given for the better protection or payment of a debt, it will be made effectual for that purpose and that not only to the immediate party to the security, but to others who are entitled

to the debt. *Russel vs. Clarke's executors*, 7 *Cranch* 69. *Moses vs. Murgatroyd* 1 *Johnson's Chancery Rep.* 129. *Phelps vs. Thompson* 1 *Johnson's Chancery Reps.* 418. *Maner vs. Harrison* 1 *Equity cases Abridgd.* 93. *Exparte Rushworth* 10 *Vesey Chancery Reps.* 411. *Wright vs. Mosby* 11 *Vesey Chancery Reps.* 13. *Hume vs. Savings Bank* 7 *Connecticut Rep.* 478.

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3. The Nicolls' or their representatives under our law could avail themselves of Harman's promise to indemnify Payson unless the contract was revoked with the consent of Payson before they declared their intention to profit by it. *La. Code art.* 1884. *Marigny vs. Remy* 3 *N. S.* 609 and the authorities there quoted. *Flower vs. Lane* 6 *N. S.* 151. *Andrus vs. Walker* 4 *La. Rep.* 238.

4. If Payson had instituted a suit, the judgment creditors could have intervened and claimed the advantage of it. They would have had a lien or privilege on any amount recovered, or if the money were received by Payson he would be compelled forthwith to pay it over to the judgment creditors. The law abhors circuity of action and if proper parties are before the court will cause that to be done directly, which must otherwise be done indirectly.

The right to have this action is given by the *Code of Practice*, art. 35. If Payson had been sued he could have called Harman's heirs in warranty and required them to pay the debt. *Lafonta vs. Poultz* 6. *N. S.* 393. *Thompson vs. Chaveau et al.* 6 *N. S.* 458.

Strawbridge for the defendant and appellant.

1. The assignees of Payson cannot prosecute this suit because it is for the recovery of a security debt of his which he has never paid.

2. The evidence shows that Payson is insolvent, is unable and never can pay the debt he guarantied; consequently Harman's heirs are not responsible, and cannot be until Payson pays.

3. That the indemnity of Harman is only given and to

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4. The question whether a surety can be sued before he has paid is a matter of remedy or contract: if the former, it falls within the *lex fori*, and must be decided by the law of Louisiana, and suit can only be instituted after payment. *La. Code* 3021. 8 *Johnson Rep.* 249. 10 *do.* 524. 1 *Washington, Pegson vs. French.*

BULLARD, J., delivered the opinion of the court.

The plaintiff sues to recover of the heirs of the late T. L. Harman, the amount of the penalty of a bond of indemnity executed by their ancestor jointly and severally with G. W. Murray of New York, in favor of Henry Payson. Payson had been the surety of Murray on two bonds conditioned for the payment of certain sums of money to F. H. Nicoll, E. H. Nicoll, and H. W. Nicoll of New York, and the bond now in question was given to indemnify and save harmless the said Payson, against his responsibility on those bonds. The Nicolls having recovered judgment against Payson for the amount of the original debt, the latter became insolvent, and in pursuance of certain chancery proceedings assigned the bond of indemnity to the present plaintiff for the use of the Nicolls, as a fund out of which the debt should be paid.

The answer of the defendants, which is in the nature of the general issue, brings the whole merits before the court on the evidence in the record. Substantially therefore the case stands as if the Nicolls, the original creditors of Murray were seeking, under an assignment from Payson, after judgment recovered against him but unpaid, to recover the amount of their judgment in pursuance of the covenants in the bond of indemnity.

Bonds or obligations entered into states where the common law prevails the rights of the parties there to must be determined by that system of jurisprudence.

These different bonds were entered into in States of the Union, where it is admitted the common law prevails, and consequently the rights and liabilities of the parties are to be measured by that system of jurisprudence, and whatever

the plaintiff would be entitled to recover in a court of law or equity in the state where the transaction originated, he is entitled to in this court in the present form of action.

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Our first inquiry is, what was the intention of the parties in giving and accepting this bond. Was it intended ultimately to operate in favor of the Nicolls for the better security of the debt due to them by Murray, or was it simply an obligation to refund to Payson whatever he should pay in consequence of his previous liability as Murray's surety? The whole instrument and all the concomitant circumstances must be looked at for this purpose. The bond recites that it had been previously covenanted and agreed between Murray and Payson, that if Murray would within six months from a certain day mentioned, by good and sufficient security, indemnify or release and discharge Payson from and against all liability, damage, costs, and charges, for or by means of certain instruments of guaranty, given to Nicolls and others, Payson would on his part release Murray from certain liabilities to him, Payson, the parties there say, "and whereas these presents are intended by the parties to said agreement, be as a compliance on the part of the said G. W. Murray, with so much of the said agreement as is above in substance and effect recited, now therefore, the condition of this obligation is such, that if the said G. W. Murray, &c. shall and do well and truly, indemnify and save and keep harmless, the said Henry Payson, &c. of from and against all his and their liability under and by virtue of the said two instruments of guaranty, and of and from and against all sum or sums of money that may at any time hereafter in due course of law be recovered, awarded, adjudged, decreed, and paid, &c. And of and from all actions, suits, judgments, and decrees that may at any time hereafter be in due course of law brought, prosecuted, obtained, and awarded against the said Henry Payson, &c.

It is in proof, that in order to procure this indemnity, Payson did release a debt due to him by Murray, amounting to upwards of thirty thousand dollars. And Murray who

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was examined as a witness, swears that as counter security to Harman for the liability incurred by him in this bond to Payson, he conveyed to Harman certain property in New York, which had been mortgaged to Nicolls, to secure the original debt.

If we give effect and meaning to every clause and word in this bond; if we are to consider the varied form of expression and terms in which the parties express themselves as any thing but idle verbiage, we cannot but be convinced, that the parties meant something more than merely that Payson should be refunded what he might be compelled to pay to Nicolls on his guaranty. The parties say that Payson was to be released from his liability, and this bond was intended as a compliance with Murray's engagement to release and discharge him, and to save and keep him harmless. This intention could not be fully effectuated without the consent of the Nicolls, the original creditors, who do not appear to have been privy to this bond of indemnity. Is it a sufficient breach of any of the covenants of this bond that Murray and Harman suffered judgment to be recovered against Payson on the original debt against which they engaged to save and keep him harmless?

Perhaps according to our own law, this agreement fairly construed, might be regarded as in the nature of a *stipulation pour autrui*, which would authorise the original creditors, the Nicolls, to pass over Payson and by the *actio utilis* come directly on Harman for the amount of the debt when it fell due. Our inquiry is however confined to the question, whether a court of equity in the common law States, according to the principles laid down in works of acknowledged authority, would authorise them or those who represented them, to proceed on an assignment of the bond to recover the amount of their debt against the surety on the bond of indemnity?

The principle contended for and to a certain extent sanctioned by a train of decisions in courts of chancery is, that all securities given to the surety for his protection and indemnity against the debt inure to the benefit of the original

creditor, and that courts of equity will give them effect in his favor, that counter securitied follow the original debt, and are considered as substantially for the better protection of the original debt; the creditor being beneficially interested. In cases where a fund has been created or assigned to indemnity, the surety it seems will settle that the original creditor may in equity cause himself to be paid out of the fund, because it is in the nature of a trust for his benefit. To this extent there seems to be no difficulty. Equity would not permit the fund thus created, to be diverted to any other purpose; that is the payment of the original debt. But to what extent and in what case a bond of indemnity on collateral security given to the surety, would be regarded in equity as a fund created for the benefit of the creditor, between whom and the counter surety there existed no privity, is a question by no means free from difficulty. It would seem to us to depend on the condition of the bond of indemnity, and whether it had been forfeited before the relief sought in equity. It then becomes a chose in action which perhaps may be reduced to possession for the benefit of the original creditor, according to the supposed intent of the parties. But this would depend on the question, whether as between the surety and the counter surety, the bond had been forfeited for a breach of the covenants; for it would seem to us against all equity, that the original creditors should interfere and make the condition of the counter surety more onerous, and render that engagement absolute in his favor which was only conditional as to the surety.

A cursory view of the adjudged cases within our reach may show us to what extent and under what limitations this doctrine has been carried by courts of equity.

In the case of *Manno vs. Harrison*, it was said that a bond creditor shall in chancery have the benefit of all the counter bonds or collateral securities given by the principal to the surety as if A owes B money, and C are bound for it, and A gives C a mortgage or bond to indemnify him, B shall have the benefit of it to recover his debt. 1 *Equity Ca. abr.* 93. In this case the nature or conditions of the bond are not

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shown. It would seem that the principle was first announced in this case, and in terms sufficiently broad to cover almost any case. But it does not appear to have been a case against a surety on a bond of indemnity. If it was a mortgage, then it would amount to a trust fund.

In the case of *Russell vs. Clark's executors*, decided by the Supreme Court of the United States, the principal question was whether a certain letter of recommendation from one merchant to another in favor of the bearer, amounted to a guaranty against certain endorsements and other engagements undertaken in favor of the person who was recommended. Murray & Co., the bearers of the letter, became insolvent and made assignments of their property. Russell to whom the letter was addressed, endorsed their bills to a large amount, the proceeds of which were employed in the purchase of rice, which among other things was assigned, and Russell sued the trustee to discover funds of Murray & Co., and prays that the intention of the parties as to the guaranty, may be enforced and payment made on account of the endorsements out of the fund arising from the sales of the rice.

The facts of the case are complicated; and it is not necessary to mention them all. But there was a fund in the hands of the trustees, and the question was, whether Russell who had endorsed the bills of the insolvent on the strength of the letter of recommendation, should be paid out of a particular fund. Chief Justice Marshall in delivering the opinion of the court says, "it is settled in this court that the person for whose benefit a trust is created, who is to be the ultimate receiver of the money, may sustain a suit in equity to have it paid directly to himself. This trust being to pay J. and W. Russell a sum they are liable to pay to N. Russell, and being created in such terms that the money is certainly payable to them, the purposes of equity will be best effected by decreeing it in a case like the present, to be paid directly to N. Russell. Indeed a court ought not to decree a payment to J. and W. Russell, without security that the debt to N. Russell should be satisfied." But nothing was finally

decided; the cause was remanded with leave to make new parties. Here was a fund in money to be distributed by trustees, and the question was how it should be distributed. In the case now before the court, the difficulty lies deeper; the very existence of the trust is denied by the defendants. 7 *Cranch's Rep.* 69, 97.

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In the next case cited, that of *Moses vs. Murgatroyd*. 1 *Johnson's Ch. Rep.* 119. Chancellor Kent said, after quoting the case of *Maure vs. Harrison* above referred to, "These collateral securities are in fact trusts created for the better protection of the debt, and it is the duty of this court to see that they fulfil the design." The securities here spoken of consisted in fact of a quantity of coffee assigned by the debtor to his endorser by way of indemnity against his liability, and the question was how much of the proceeds should be appropriated to pay the original creditor who was the plaintiff. In this case it further appears that the assignment of the coffee was absolute, and parole evidence was admitted to show the real intention of the parties, and the chancellor remarked that it was not material whether the plaintiffs were apprised at the time of the creation of this security.

Phillips vs. Thompson. 2 *Johnson's Ch. Rep.* 417, was precisely this: a judgment bond was assigned to indemnify certain endorsers. The same principle was applied to the disposition of the funds paid under the judgment. The holder of the note was considered entitled to the benefit of the collateral security.

The Supreme Court of Errors of Connecticut recognised the same doctrine in the case of *Homer vs. the Savings Bank*, and stated the principle as extracted from the different cases to be; that when the collateral security is given on property assigned for the better protection of the debt, it shall be made effectual for that purpose. 7 *Connecticut Rep.* 478.

The question in the case of *ex parte Rushworth*, 10 *Vesey*, 420, related to the right of the surety in a bond of indemnity, to avail himself of the proof made by the creditors under a commission of bankruptcy for his own reimburse-

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ment. It was in fact a question of subrogation, and Lord Eldon said that a surety is entitled to all the securities the principal has; the very converse of the proposition advanced in the other cases. In *Wright vs. Mosley*, 11 *Vesey*, 13, the master of the rolls stated the question to be whether the court would act upon the assignment at the instance of the surety in whose favor it was made. His argument rests upon what he considers a settled principle, that as the creditor is entitled to the benefit of all the securities, the principal debtor has given to his surety, so the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor.

It will have been perceived that in all the cases, which have thus come under review the creditors who sought relief in equity proceeded upon a tangible fund created originally for the indemnity of the surety but which by a kind of equitable fiction was regarded as the real pledge of the creditor. In the present case that fund consists not in money, but in the liability of Harman under his bond. According to the principle stated by Chief Justice Marshall, if Payson were now demanding the money from the defendants, if it be really due, the Court of Equity would not decree it to him without requiring security that it should be paid over to the original creditors. This case differs from all the others and we are driven back at last to the question, has this bond been forfeited and had a right of action accrued to Payson before he assigned the bond to the plaintiff?

So where A gave his bond of indemnity to B to secure him against his guarantee for C to D, on the failure of C, and B his surety becoming liable on his guarantee to D and assigning his indemnity bond from A, to the creditors of D: held, that the latter can recover on it even before actual payment by B.

We have already said that the intention of the parties appears to have been, that Murray should release and discharge Payson from all liability on account of his guaranty. Harman acceded to this obligation as surety and stipulated that on notice of the default of Murray being given, he would step in and save Payson from loss. Notice is proved to have been given and we are of opinion that they did not comply with the covenants and the bond was forfeited.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

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The sheriff's deed and return upon the execution are *prima facie* evidence of title in the purchaser at sheriff's sale; and he who seeks to annul such an alienation must show that the formalities required by law were not complied with.

The same *delays and formalities* must be observed in executing writs of *seizure and sale* against mortgaged property, as are required when property is seized under a writ of *feri facias*.

So in a sale of immovable property under a writ of *seizure and sale*, issuing on a judgment against third possessors of mortgaged property, *three days* notice is required to be given, *after seizure*, and before advertising; otherwise the sale is void and transfers no right in the property to the purchaser.

This is a petitory action instituted by the plaintiffs to recover three lots of ground in the city of New-Orleans, in the possession of the defendant. Both parties set up title to the property in question, and both derive title from the same source. The defendant pleads a general denial to the action; and alleges that he holds under a good title and is a possessor in good faith. The plaintiffs derive their title from Edward Livingston. The three lots in question, with several others, were sold by the United States Marshal for the Eastern District of Louisiana, under and in virtue of a writ of *venditioni exponas*, from the District Court of the United States, for the Southern District of New-York, against Edward Livingston, and purchased in by John W. Smith, the agent of the United States, on the 11th February 1827, and by him sold and conveyed to the plaintiffs by notarial act passed on the 3d day of June 1828. These lots with others were sold, originally, to satisfy a judgment which the United States had obtained against E. Livingston, and being purchased in by the agent of the United States, the judgment was credited with the amount bid for them.

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The defendant was assignee of several judgment debts against E. Livingston amounting to upwards of fourteen thousand dollars, which judgments were duly recorded *anterior* to the sale of this property by the marshal, in February 1827, and operated a general mortgage on all of E. Livingston's estate. After the sale by the marshal, and the purchase by Grant and Oldham in 1828, the present defendant instituted an hypothecary action, in virtue of his general mortgage on Livingston's property, against them as third possessors. He obtained judgment in which the lots in controversy were ordered to be seized and sold to satisfy it. An execution issued accordingly directed to the sheriff of the parish of Orleans. The sheriff made the *seizure* on the 28th day of July 1829, and advertised the property, seized, to be sold on the 29th day of August following, thirty-one days from the seizure, and without giving three days notice to the defendants in execution or third possessors, before advertising. Daniel T. Walden, the plaintiff in execution, became the purchaser. The plaintiffs pray that the lots in question be surrendered up to them, and that Walden be condemned to pay them three thousand dollars for fruits, rents and damages.

The district judge was of opinion the formalities of the sale were complied with; that the title of Walden was good, and superior to that of the plaintiffs: and gave judgment for the defendant. The plaintiffs appealed.

Maybin and Slidell, for the plaintiffs.

1. The sale to the defendant under his own execution is null, because the delays and formalities of the law were not observed. The sheriff did not give three days notice to the defendants in execution. *Code of Practice* art. 654.

2. The sheriff is required to execute the writ as soon as he receives it, observing the same *delays* and formalities as in writs of *fiery facias*, by giving three days notice after seizure, and before advertising. In this case the property must be advertised thirty full days. *Code Practice*, 643, 654, 655, 667, 670 and 745.

3. The sheriff received the execution on the 28th July, and advertised the property to be sold the 29th of August 1829, just thirty-one days afterwards. The law requires thirty-three full days. The sheriff has no discretion; if he can sell in thirty-one days after receiving the execution, he may do the same in *ten*.

4. The three days notice before advertising is required in all seizures; in the *via executiva*. *C. Pr.* 735; in the *via ordinaria*, *ib.* 745; in *feri facias*, *ib.* 654; in the *writ of possession*, *ib.* 632; in the delivery of a slave or other specific object, *ib.* 634.

5. In this case it was necessary, independently of the general objects of the law requiring this notice, to enable us to point out other property of Livingston; and we are bound personally for the debt due from Livingston to Walden. *C. Practice*, 71.

6. This is a forced alienation of property, and the decisions of this court are direct and uniform in requiring all the formalities of law to be strictly complied with; more particularly when our property is taken to pay the debts of another.

7. Walden's right to seize and sell this property, which was purchased and paid for in good faith by the plaintiffs is a matter of strict law, and he cannot complain if we require of him the fulfilment of *all* the requisites of the law. The decisions are uniform and full to this point from the commencement of the court to this time. 4 *Martin*, 513; 8 *id.* 682; 11 *id.* 610; 1 *Mar. N. S.* 596; 6 *id.* 347; 7 *id.* 185. 8 *id.* 247 and 391. 3 *La. Rep.* 418, 425, 476; 4 *id.* 150, 207; 5 *id.* 486.

8. The decisions of the Supreme Court of the United States are in exact accordance with this court on this point. 4 *Wheaton*, 77; 6 *id.* 119. 4 *Peters*, 349.

Preston and Hoffman, for the defendant.

1. There was no notice of seizure before advertising required in this case, because the writ of seizure issued on a judgment rendered contradictorily with the present plaintiffs,

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which decreed these lots, particularly, to be seized and sold in virtue of the general mortgage against Livingston.

2. Notice of seizure is only required in an ordinary execution or *feri facias*, to enable the debtor to obtain a release of a part of the property, if the seizure is excessive, or to point out other property, and to let him know what is seized, that he may act as circumstances may require to protect himself. *Code Practice*, 652, 653, 662.

3. The object of giving notice of the seizure in executory process is the same, and moreover to enable the debtor to make the oppositions permitted by law. *Code Practice*, 735, 739, &c. 71.

4. In the case before the court no possible reason can exist for giving notice of having seized the property. The debtor was notified by the judgment of what was to be seized. The seizure could not be reduced, because the judgment directed the whole three lots to be seized. Nothing else, nothing more nor less could be seized; nor could the debtor make any opposition to the seizure as that was made to obtaining the judgment.

5. The article 654 of the *Code of Practice*, relating to writs of *feri facias*, alone has no relevancy to the case before the court; nor are the special cases provided for in article 632 and 634. In this case a particular execution issued against specific property in pursuance of the power granted by law. *C. Practice*, 625, 6.

6. If there were any informalities in the sale by the sheriff, it was incumbent on the plaintiffs to show it. The sheriff's return and deed of sale declares a compliance with all the formalities of law. 3 *La. Rep.* 476. 1 *Peters*, 441. *Phillips on Ev.* 313. 8 *Martin*, 682. *Roscoe on Ev.* 305.

7. The law of Spain was the same as our own. A sale by authority of justice never could be annulled for the want of legal formalities; bad faith and lesion, were both necessary to impeach it. *Febrero*, part. 2, lib. 3, chap. 2 sec. 5, 354.

8. There can be no motive in requiring three days notice of seizure under an order to seize specific property, but there is much reason for it under a *fi. fa.* when all the property of

the debtor is liable. The law has always been construed in this way by the sheriff, and the same construction has been given to it in cases of sales by syndics who are required to make them *at the same terms and under the same formalities as property seized on execution is sold.* La. Code, 2180.

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In this case the Judges delivered their opinions *seriatim*.

MATHEWS, J.

This is a petitory action in which the plaintiffs seek to recover from the defendant (whom they allege to be a possessor without title,) three lots of ground described in their petition, and situated in the faubourg St. Mary, &c. The defendant in his answer sets up title. Judgment was rendered in his favor in the court below, from which the plaintiffs appealed.

The titles adduced by the parties to the suit show that they claim from the same original source, through different channels. The deed to the plaintiffs purports to convey to them the right to the property in dispute which the United States had acquired under the Marshal's sale by virtue of an execution levied on these lots amongst many others as belonging to Edward Livingston. The defendant claims under a sheriff's deed made by the sheriff of New-Orleans, in pursuance of a sale under execution issued on a judgment rendered by the District Court of the first Judicial District, in which the lots in question were decreed to be subject to several judicial mortgages (of which the defendant is assignee,) resulting from the registry of judgments against Livingston.

The defendant claiming title from the same source from which the plaintiffs derive their rights, he is not at liberty to attack the validity of the title adduced by them.

The question presented by the case for decision, relates to the legal force and effect of the titles adduced by the parties litigant. That shown by the plaintiffs is good and valid, sufficient to authorise a recovery, unless that relied on by the defendant is better.

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He pursued them in a former suit as third possessor of the property, subjected to judicial mortgages of which he is assignee as above stated. The pursuit was in the *via ordinaria* although he had taken some of the steps required by the Code of Practice to authorise an immediate seizure and sale. That suit ended as I have already stated, in a decree ordering a seizure in execution of these lots specified in the petition as subject to the lien claimed by the plaintiff. The seizure was made by the sheriff, the property was exposed to sale, the plaintiff became the purchaser and now relies on the deed from that officer as evidence of his title.

The validity of this instrument is attacked by the plaintiffs in the present action. They assume as a general principle, that, in forced alienations of property under authority of justice all delays and formalities required by law, must be strictly fulfilled on pain of nullity. Their counsel also assumed in argument that the return of the sheriff on the execution and his recital on the deed that the property was sold after having been duly advertised according to law, afforded no evidence, not even *prima facie*, of the truth of the facts stated in the return or those declared in the deed. The first of these principles I believe to be correct; the latter not so. In relation to sales made by sheriffs and other ministerial officers under executions, it has been settled by decisions of this court that the returns of the officers are to be taken as *prima facie* evidence between the parties to a suit. See 8 *Martin*, 682 and 4 *La. Rep.* 473. As it regards sales made under authority of executions issued on judgments our decisions have established the doctrine of presumptions favorable to the course of conduct pursued by ministerial officers in such situations. These presumptions like all others must yield to evidence, adduced to the contrary; notwithstanding the difficulty necessarily inherent in all attempts to prove negative propositions. I see no good reason to change the doctrine already established. To make such a change would require much more forceable reasons than might have

sufficed for the establishment of a different principle in the first instance. For, in the belief of the correctness of those decisions many may have been induced to purchase property at sheriff's sales.

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Three principal grounds of nullity are alleged against the validity and legal effect of the sheriff's deed, to transfer the property in dispute to the defendant in the present case. First, want of notice of the judgment, second, want of notice to appoint appraisers, and third, want of three days notice to the defendants in execution after the seizure of the property.

As to the two first of these notices required by the Code of Practice, the evidence of the case shows clearly an impossibility that personal service could have been made, for both the defendants were absent from the state: and as to the third it is not pretended that any such notification was ever made.

If the law imperatively requires the last of these notices to be given, and the sheriff failed in the fulfilment of his duty in this respect, the sale made by him and deed consequent thereon, did not divest Grant and Olden (defendants in that case and plaintiffs in this,) of their title to the property now in contest. Whether this proposition be true or false depends on an interpretation of several articles of the Code of Practice. Believing it to be true and being sufficient for the decision of the case, I forbear to determine whether or not the plaintiffs have established negatives in relation to the two first notifications.

The evidence on the record shows clearly that the sheriff proceeded to sell the property thirty-one days after he had received the execution or after he had seized. The law requires real estate and slaves to be advertised at least thirty days before exposure to sale, &c.

By the art. 654 of the *Code of Practice* a duty is imposed on the sheriff by which he is required, as soon as he shall have executed a writ of *fieri facias* "to give notice thereof in writing to the debtor, &c. which he shall deliver to him in person or leave at his ordinary place of residence.

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Art. 365: "Three days after this notice the sheriff shall advertise the sale of the property seized, &c."

Had the sale by the sheriff in the present instance been one under an ordinary *feri facias* without advertisement, thirty days after notice of seizure it must be admitted that it would not have transferred to the purchaser the property sold in consequence of the officer not having pursued the formalities required by law. It would be contrary to the first principle assumed on the part of the plaintiffs and admitted to be correct, to wit: that forced sales are void unless all the formalities required by law be pursued in the alienation of property.

The sale made was in pursuance and in execution of a judgment of the court rendered in a suit prosecuted in the ordinary mode of proceeding in civil actions, and it might be questioned whether the rules applicable to sales under ordinary writs of execution, ought not absolutely to govern the case. But admitting it to partake rather of the mode authorised in executory process, still the conclusion will be the same.

In the chapter of the Code of Practice which treats of executory process, by *art. 745* it is required of sheriffs that "when they sell property which has been seized conformably to the provisions of this chapter, they must cause the same appraisements to be made and observe the same *delays and formalities* as are prescribed for the sale of property seized in execution." What are these delays and formalities? Respecting judgments subject to "appeal, the party in whose favor one is rendered can only proceed to the execution after ten days, counting from the notification which he is obliged to make to the opposite party, &c."

This is one of the delays and formalities provided for by law. An other is that, notice of seizure must be given to the *defendant in execution* three days previous to advertisement. *Articles 654 and 655.* The same delays and formalities must be observed in executory process. The last of these formalities and the delay of three days was not observed by the sheriff in executing the judgment which

The same delays and formalities must be observed in executing writs of seizure and sale against mortgaged property, as are required where property is seized under a writ of *feri facias*.

Walden had obtained against the present plaintiffs; EASTERN DIS. June, 1834. therefore the sale made by him is void, in other words their right to the property was not transferred to the purchaser, because all the formalities prescribed by law were not pursued in that forced alienation.

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Much was said in the course of argument by the counsel for the appellee tending to show that the same reasons or just causes requiring notice of seizure in a *fieri facias* have no existence in cases of orders of seizure. This argument was based we presume on the maxims, that, "*lex consistit in ratione; cessante ratione cessat ipsa lex*"; and that *argumentum ab inconvenienti semper valet in lege*." These maxims may do very well when the law is doubtful. But when it is express and positive and enacted by legislative authority as we believe the articles of the Code of Practice in relation to the subject now under consideration to be, they are without force. The law does not distinguish between these different executions, and we as judges are not permitted to make any distinction.

So in a sale of immoveable property under a writ of seizure and sale, issuing on a judgment against third possessors of mortgaged property, three days notice is required to be given after seizure, and before advertising; otherwise the sale is void and transfers no right in the property to the purchaser.

It is therefore ordered, &c. that the judgment of the District Court be avoided, reversed and annulled; and it is further ordered, adjudged and decreed, that the plaintiffs and appellants do recover from the defendant and appellee the three lots of ground as described in their petition, with costs in both courts.

BULLARD, J.,

The court is unanimous in adhering to the principle settled in the cases of *Barabino vs. Brashears* and of *Lafon vs. Lewis*, that the sheriff's deed and return upon the execution are *prima facie* evidence of title in the purchaser at sheriff's sale, and consequently that he who seeks to annul such an alienation must show that the formalities required by law were not complied with. In this case it appears that only thirty or thirty-one days elapsed between the day the writ came into the hands of the sheriff and the sale of the property, and the

The sheriff's deed and return upon the execution are *prima facie* evidence of title in the purchaser at sheriff's sale; and he who seeks to annul such an alienation must show that the formalities required by law were not complied with.

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question is whether the sheriff was authorized by law to sell without allowing further delay.

It is conceded on all hands that in the case of a *feri facias* the objection would be fatal, that the sheriff is bound to seize immediately, to give three days notice of the seizure, and to advertise during thirty days after that notice before he can proceed to sell.

The 745th article of the *Code of Practice* requires that "when the sheriff sells property which he has seized conformably to the provisions contained in this chapter, he must cause the same appraisements to be made, and observe the same delays and formalities as are prescribed for the sale of property seized in execution." The chapter of the Code containing this provision relates to executory process, and the preceding article applies the same rule to that process whether directed against the original debtor or against a third possessor. In the case now before the court the present plaintiffs were third possessors. I take it to be an admitted principle, that where the law gives a summary remedy, it may be waived and the ordinary way resorted to. If the mortgagee may apply to the judge in chambers for executory process on giving certain previous notice, he may also at his option cite the party to show cause why such process should not issue, and the judgment of the court pronounced contradictorily with the party is, as to the process to be issued in pursuance of it, similar to the fiat of the judge at chambers. I do not think there are two kinds of orders of seizure and sale in any other sense of the word, and I am of opinion that whether issued by the judge summarily or by a court after citation to the third possessors, the execution of the writ is governed by the article 745 of the Code, and the sheriff in executing the writ is not to be guided merely by analogy. The present defendants were third possessors of the lots subject to judicial mortgage, and the proceeding against them was prosecuted under that part of the Code which regulates the hypothecary action, to wit: *part 1, chap. 3, sec. 3.*

I will not pretend to say that a mere failure to furnish a list of the property seized would have been a fatal objection.

nemo cogitur ad vana, but I do not see how we can dispense with the three days previous to the advertisement any more than with the thirty days after. They are both equally delays to which the defendant in a *fi. fa.* is entitled. If it would be useless and nugatory to furnish a list when the writ itself leaves no discretion as to what property shall be seized, it does not follow that the *delay* of three days would be equally useless. The possessor is authorised to pay it any moment before the sale and cause the property to be released. The delay is therefore a right accorded to him.

It has been intimated, although I did not understand it as admitted in argument, that a different practice has prevailed, particularly in this district, and fears are expressed that this decision will be productive of much litigation. If I was satisfied that the courts had since the promulgation of the *Code of Practice* put a different construction on these articles and that the practice had been generally acquiesced in, such contemporaneous interpretation of these provisions would be entitled to great weight in my mind. But on these points the court is not judicially informed, and I am not prepared to yield the conviction of my judgment to the apprehension of future evil.

In my opinion the judgment ought to be reversed, and ours should be for the plaintiffs.

MARTIN, J. *discented*.

The principal argument of the plaintiffs counsel, assumes that the sheriff was bound to give three days notice of the seizure, with a list of the property seized, to the debtor; that the sale could not take place until it had been advertised during thirty days, to be counted from the last of the three days which were to precede the first advertisement. So that the sale could not be legally made till the thirtieth day of August, or thirty-four days after the writ came to the hands of the sheriff.

The counsel of the defendant contends there was no necessity for any notice of the seizure, nor of furnishing any list

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of the property seized; that the sheriff was bound to seize as soon as he received the writ, without delay, as soon as he had seized he was bound to advertise, and at the end of thirty days to sell. So that the sale might have legally been made on the 27th of August, or on the thirty-first day after the sheriff received the writ.

The decision of this case depends on the assent which this court may give to either of these propositions.

The writs of execution which our courts are authorised to issue differ from each other according to the nature of the judgments which they are intended to enforce. *C. Practice, art. 128.*

In the present investigation it will suffice to mention two modes of execution; that by the writ of *fiery facias*; that by the writ of *seizure and sale*.

There are two kinds of writs of seizure and sale; the writ issued by a judge at chambers, on an instrument importing confession of judgment; that issued from a court on a judgment decreeing the seizure and sale of a specific piece of property for the payment of the plaintiff's demand.

The writ under which the property now claimed, was sold, is a writ of seizure of the latter kind.

As to the duty of the sheriff, in seizing, giving notice and selling under this writ, our Code of Practice has no specific provision.

The first paragraph of the third section of the sixth chapter of the Code of Practice, details with considerable minuteness the duty of the sheriff, in seizing and giving notice under the writ of *fiery facias*; and in the next paragraph his duties are treated of in the sale and adjudication of property seized under that writ.

The seventh chapter treats with equal detail of the duties of that officer in giving notice and seizing under the first writ of seizure and sale; *i. e.* that obtained at chambers. As to the mode of selling under this writ, the *redactors* of the Code have contented themselves with directing the sheriff in selling property under this writ, to follow the rules prescribed for the sale of property under a writ of *fiery facias*.

Although the Code has not provided any specific provision for the sheriff in the second writ of seizure and sale, his duty is prescribed to him by the writ. He must seize and sell; but this he must not do arbitrarily. He cannot sell by private sale, because every judicial sale is made by auction. Sales by auction cannot well take place without being advertised, nor until after some delay to enable creditors to prepare themselves and attend.

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This court has held, that although the law had fixed no period, during which sales by constables are to be advertised, these officers were to be governed by the directions given by law to sheriffs.

First, the sheriff, under the writ of seizure and sale, issued by a court, must *seize*. It is contended that as the debtor under a writ of seizure and sale, obtained at chambers, is entitled to a notice of three days before seizure, the same delay must precede the seizure in a writ issued on a judgment obtained in the ordinary way. This appears to me a *non sequitur*. The Code does not require in the latter case, which has no similarity in this respect, with the former, in which the delay is ordered.

In the administration of justice some delay must necessarily take place. Delay is also for the benefit of both parties, as that during which the property to be sold is to be advertised. Without this the creditor would often fail from obtaining his due, by the sacrifice of property, and the debtor would in almost every case suffer materially. Other delays are for the advantage of the debtor only, as that which we are considering. It enables him if he has good cause at first to suspend, and finally to prevent the seizure or sale of his property.

But unnecessary delays are waste of time, and the law abhors all waste.

A writ of seizure and sale obtained at chambers comes against the property of the debtor like a clap of thunder. Not so, when the writ is issued to carry a judgment into execution. The debtor has had notice of the creditor's pretensions, has been summoned and offered the opportunity to contest

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them. The judgment has been pronounced contradictorily with him. His opposition has been overruled and his property decreed to be seized and sold to pay his debts. His creditor by a notification of the judgment has warned him that after the lapse of ten days the sheriff would seize.

It appears to me, that as to the seizure, the writ under which the sale took place, bears greater resemblance to the writ of *feri facias*, than to the order of seizure and sale obtained at chambers, and that, consequently the provisions regulating a seizure under the *feri facias* must govern the sheriff. He must as soon as he receives the writ seize, without any delay. *Code of Practice*, 643.

It is however, contended, that if the debtor was not entitled to a delay of three days *before* the seizure, he ought to have had it *after*: The Code requiring the sheriff on the execution of a writ of *feri facias*, to give notice to the defendant, and to furnish him with a list of the property seized, *id.* 654; and three day thereafter to advertise the property for sale. It is contended that this delay of three days between the seizure and the advertisement is a necessary one even in the case of a writ of seizure and sale; and the debtor having been deprived of it, his property was not sold with the formalities required by law, and the sale did not divest him of his title. To this it is answered, that the Code does not require this delay in the writ of seizure and sale, obtained at chambers; that it is perfectly silent as to this delay in the case of a writ of seizure and sale obtained on a judgment, which has a much greater analogy to the other writ of seizure and sale than to the *feri facias*. Lastly, that the legislator has avowed the reasons which induced him to direct the delay in a seizure on a writ of *feri facias*, and has declared they do not exist in the writ of seizure and sale. *Id.* 646, 648. The debtor has a right to object to the seizure of the whole or any part of the property taken, if he points out other property, which he may spare with less inconvenience, to a sufficient amount. This right must be exercised before the property seized be advertised. *Id.* 649. This right does not exist as to property especially mortgaged, or on which there is a privilege; and

it is only as to this kind of property that a writ of seizure and sale may be obtained by a judgment, or at chambers. *Id.* 648.

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I conclude that as this delay of three days is not required by the Code in the writ of seizure and sale: as none of the reasons which influenced the legislator in directing on seizure under a *feri facias*, are applicable to the case of a writ of seizure and sale, the sheriff acts correctly when he disregards it in a seizure under the latter writ.

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But it is contended that the Code requires the sheriff when he sells property under a writ of seizure and sale, obtained at chambers, to cause the same appraisements to be made, and observe the same delays and formalities as are prescribed for the sale of property seized on execution: *id.* 745; evidently referring to the paragraph which treats *ex professo* of the sale and adjudication of property under the writ of *feri facias*. It is not in the paragraph thus referred to, but that which treats of the seizure of property, and the notice thereon in the case of a writ of *feri facias*, that the delay of three days is directed to take place. *Id.* 654, 655. The Code assimilates proceedings on the writ of seizure and sale to those on the writ of *feri facias* merely in regard to the sale.

It is true, in the paragraph which relates to the sale, the advertisement is directed to take place three days after; the advertisement to be made three days after the notice given to the defendant of the property seized. *Id.* 667. But this delay had been presented and the advertisement forbidden to be made before the expiration of it. *Id.* 654, 655. The sheriff, in my opinion, was not bound merely to obtain a third day to allow a delay which he was not otherwise authorised to give, but was bound, in the case of the writ of seizure and sale to advertise as soon as he had performed the acts required by him, before the delay of three days in the case of a *feri facias*, i. e. the seizure.

It was admitted in argument that the construction which I place on this part of the Code is that which has generally, if not universally prevailed; it is that which has governed the sheriff of this parish ever since the promulgation of the Code. If the sale to the defendant be set aside, there is not

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a sale under a writ of seizure which can stand the test. The judgment of this court will uplift the flood-gates of litigation, cupidity will be invited to repeated attacks, and the people will feel alarmed and insecure at the precariousness of judicial sales.

On all the other points made in the case I agree with the majority of the court.

I therefore, think the judgment of the District Court ought to be affirmed.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

A suit instituted against the husband and wife, to compel the latter to renounce all liens and tacit mortgages she may have on certain property in the plaintiff's possession, held under titles derived from her husband, is *sui generis*, novel and not tolerated by law and will be dismissed.

The plaintiff alleges he purchased certain lots or pieces of land of one William Gormley who bought them of the defendants, as evidenced by acts of sale annexed; that Gormley transferred to him all his title derived from the defendants and subrogated him thereto; and that he has offered part of said property to the Union Bank on mortgage on which to obtain stock to the amount of nine thousand dollars, which was granted to him on condition that he would obtain the renunciation of Madame Foucher to all her right, title, privilege, mortgage and pretensions to said property. The plaintiff alleges that an amicable request has been made, but that the husband refuses to authorise such renunciation, by reason of which he has sustained damages to the amount of five thousand dollars; he therefore prays that the court decide whether Madame Foucher has any right, claim, privilege,

&c. to said property; and if not, to compel her and her husband to make the renunciation required.

The defendants' counsel excepted to the petition as showing no cause of action; and pleaded the general issue on the merits; and that this suit was vexatious by reason of which the defendants has sustained five hundred dollars in damages for which they pray judgment.

On the trial it was admitted the plaintiff had offered this property to the Union Bank for stock to the amount of nine thousand dollars, and that the title thereto was reported by the counsel of the bank as complete, with the exception of the renunciation of Madame Foucher, who had refused on being applied to, to renounce; and further that the plaintiff afterwards obtained his full proportion of the stock of said bank which he had applied for, on offering other security.

The district judge sustained the exception; and on the merits gave judgment dismissing the suit.

The plaintiff appealed.

Roselius, for the plaintiff, relied on the case of *Livingston vs. Heerman*, 9 Mar. 598, as being analagous to this; if it is not a precedent, it is decided on substantially the same principles on which the present plaintiff relies.

Denis, contra:

MATHEWS, J., delivered the opinion of the court.

In this action the plaintiff prays that the wife of the defendant may be compelled to renounce all liens and mortgages which she may have on certain property in his possession held under title derived from her husband. The defendants pleaded an exception to the suit, alleging that the petition contained no legal cause of action. This exception was sustained by the court below, and the plaintiff adjudged to pay costs, from which he appealed.

The suit appears to us to be one *sui generis* not related to any class of actions with which we are acquainted. It is

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WIFE.

A suit instituted against the husband and wife, to compel the latter to renounce all liens and tacit mortgages she may have on certain property in the plaintiff's possession, held under titles derived from her husband, is *sui generis*, novel and not tolerated by law and will be dismissed.

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really novel, and exhibits a novelty not tolerated by any express law known to us, nor can it be sustained in pursuance of any sound principles of jurisprudence. The court below acted, (in our opinion) correctly in dismissing it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

COFFIN vs. PANDELLY.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

Where the appellant makes no effort to sustain his appeal, and no reason appears from the evidence to hope for success, the judgment will be affirmed, and damages allowed as for a frivolous appeal.

The plaintiff alleges that he sold and delivered to the defendant three hundred and eighty-six thousand one hundred bricks, payable in fire wood, as follows, viz: for two hundred and thirteen thousand six hundred bricks, five cords of wood for each thousand bricks, and for one hundred and seventy-two thousand five hundred bricks 4 cords of wood for each thousand bricks, making in all one thousand seven hundred and fifty-eight cords of wood; that after delivering five hundred and seventy cords the defendant failed to comply with his engagement. He bound himself in a new writing the 24th of August 1833, to deliver the remainder of the wood at the rate of forty-five cords per week until it was completed. Only three hundred and ninety cords were delivered under the new agreement, making in all six hundred and ninety cords; still leaving seven hundred and ninety-eight which he totally failed to deliver. The plaintiff estimates the wood still due him as worth three dollars per cord, amounting to

two thousand three hundred and ninety-four dollars, for which he prays judgment.

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The defendant pleaded a general denial.

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The parish judge after examining witnesses, considered the allegations in the petition fully made out except as to the value of the wood, which was proved to be worth only two dollars and seventy-five cents per cord, amounting to two thousand one hundred and ninety-four dollars and fifty cents, for which judgment was rendered against the defendant.

PANDELLY.

He appealed.

Derbigny, for the plaintiff.

Hoa, contra:

MARTIN, J., delivered the opinion of the court.

The petition states that the plaintiff having delivered to the defendant three hundred eighty-six thousand one hundred bricks, the latter engaged to furnish him with good fire wood at the following rates, viz: for three hundred thirteen thousand six hundred bricks five cords for each thousand; for one hundred seventy thousand five hundred bricks, four cords for each thousand, making together in all one thousand seven hundred fifty-eight cords; that the petitioner after having received five hundred seventeen cords and the delivery of the residue being much delayed, pressed the defendant, who bound himself to deliver weekly forty-five cords, that the cord of wood is worth three dollars; that since the last agreement the defendant has delivered about three hundred ninety cords, which leaves a balance due to the plaintiff of seven hundred ninety-eight cords, of the value of two thousand three hundred ninety-four dollars, for which judgment was prayed.

The general issue was pleaded.

The parish court was of opinion that the plaintiff had proved all his allegations except as to the value of the wood, which according to the evidence was worth but two dollars

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and fifty cents per cord, gave judgment for two thousand one hundred ninety-one dollars and fifty-cents.

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Where the appellant makes no effort to sustain his appeal, and no reason appears from the evidence to hope for success, the judgment will be affirmed, and damages allowed as for a frivolous appeal.

The defendant appealed.

He has made no effort to sustain his appeal before us. We have carefully examined the evidence and are unable to discover on what grounds he might have reasonably hoped for success in this court; the appeal is a frivolous one, and we think it our duty to accede to the prayer of the appellee for damages.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs; and that the plaintiff further recover from the defendant, as damages for the frivolous appeal, two hundred nineteen dollars and fifteen cents.

VICTOR vs. TAGIASCO'S EXECUTOR.

**APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.**

The surviving husband, not separated in bed and board inherits the estate of his deceased wife, who *died without* leaving descendants, ascendants or collateral relations duly acknowledged, in preference to her natural brother.

The surviving wife is called to the inheritance and preferred to all the natural relations of the husband, and he to all her natural relations except those of the descending line.

The plaintiff alleges that he was married to Marie Tagiasco f. w. c. in June 1831, by whom he had several children; that in May 1833 his wife and children died with

the cholera; and that a few days before her death his wife made a will, in which, after bequeathing a few legacies she instituted her children her universal heirs and named Jean Louis Doliolle f. m. c. her testamentary executor, who caused an inventory to be made of said estate; all this took place during the temporary absence of the plaintiff. He alleges that he is the surviving husband of the deceased Marie Tagiasco who has left no lawful ascendants, descendants or collateral relations, and that he has never been separated from his said wife in bed and board, and therefore entitled to inherit her succession in his capacity of surviving husband. He alleges he has demanded the delivery of said succession from the executor as sole heir of his deceased wife, who refuses to give it up: he prays that the executor be compelled to surrender up the whole of said succession and to render a faithful account of his administration, &c.

The executor in his answer plead the general issue; and that Louis Baptist Roux f. w. c. and mother of the deceased Marie Tagiasco, in her last will in which she recognized the deceased to be her natural child, also recognized one Jean Tagiasco f. m. c. as her son, and brother of the deceased, and as such has a right to claim her succession, &c: he prays that the said Jean Tagiasco to be made a party to the suit as he has no other interest than as executor, &c.

The natural bother appeared and answered, asserting his heirship and claim to his deceased natural sister's succession, and prayed that the plaintiff's claim might be rejected, &c.

By a statement of facts made upon the trial, the facts set out in the pleadings were admitted to be substantially correct.

The Judge of Probates considered the sole question to be whether the plaintiff as surviving husband, is to be preferred as heir, to the natural brother of the deceased, in inheriting her succession; and that it was to be decided on the following article of the *La. Code*: article 918. "If a

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married man has left no lawful descendants nor ascendants nor any collateral relations but a surviving wife not separated from bed and board from him, the wife shall inherit from him to the exclusion of any *natural* child or children duly acknowledged."

"If, on the contrary it is the wife who died without leaving any lawful descendants, ascendants or collateral relations, her surviving husband not separated from bed and board from her, shall not inherit from her except in case she should leave no natural child or children by her duly acknowledged."

In this case it is a surviving husband who claims to inherit the *succession* of the deceased. The only remaining question is whether the said wife has left any lawful descendants, ascendants or collateral relations, or any natural child or children by her duly acknowledged, and whether there was a separation of bed and board, &c.

The statement of facts which is the evidence of the case has answered the question in the negative, the conclusion is that the husband must inherit. Judgment was accordingly rendered ordering the testamentary executor to deliver up the succession to the plaintiff, pay over all monies by him received, and render an account, &c. The widow and heirs of Jean Tagiasco the natural brother of the testatrix appealed.

D. Seghers for the plaintiff and appellee.

Pichot for the appellants.

MARTIN, J., delivered the opinion of the court.

The defendant was sued by the late husband of his testatrix who claimed her estate on an allegation that he had never been separated from her, and that she left neither ascendant or descendant, nor collateral relations capable of inheriting.

His pretensions were resisted on the ground that the

defendant's testatrix had left a natural brother who was entitled to her estate in preference to the plaintiff her late husband.

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There was judgment for the plaintiff, and the natural brother having died, in the meantime his widow and the natural tutrix of his children appealed.

The only question which the case presents for solution is whether the Court of Probates was correct in preferring the claim of the husband to that of the natural brother.

The pretensions of the appellee rest on the articles of the *La. Code* which provides that if a married man has left no lawful descendants, ascendants or any collateral relations, but a surviving wife not separated from bed and board from him, the wife shall inherit from him to the exclusion of any natural child or children duly acknowledged. On the contrary, if it is the wife who died without any lawful ascendant, descendant or collateral relation her surviving husband not separated in bed and board from her shall not inherit from her, except in case she should not leave any natural child or children duly acknowledged.

The surviving husband, not separated in bed and board inherits the estate of his deceased wife, who died without leaving descendants, ascendants or collateral relations duly acknowledged, in preference to her natural brother.

The Court of Probates has thought that the article being clear and free from ambiguity, and the plaintiff having brought himself clearly within it, his pretensions could not be resisted: that the article 918 could only be reconciled with the preceding by being considered as an exception thereto; and that it could be more easily reconciled with it, than with the article 923.

On the part of the appellant we have been referred to the works of several French authors on the construction and interpretation of several articles of the *Napoleon Code* which are similar to those of the *La. Code*, relied on this case, and which are considered to bear very great analogy to the latter. 8 *Tissandier* 385 No. 1945. *Favard de L'Anglade des successiones* 154. *Rogron on article 766 de Code Napoleon*. 4 *Toullier* 280 No. 269. 3 *Duranton livre 3, titre 1*.

It has appeared to us that the Court of Probates did not err. In our legislation the surviving wife is preferred to all

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the natural relations of the husband, and he to all her natural relations except those in the descending line. *La. Code* 918 and 913. It is true some provision is made for natural brothers and sisters and their descendants. *Ib.* 917; to which an exception is made for the surviving wife or husband. *Ib.* 918. If in order to place either of these in the situation the legislator has clearly assigned them natural brothers and sisters, or their descendants are in certain cases postponed to the former; Courts of Justice merely comply with the will of the legislator in giving to the surviving spouse his legitimate rank.

It is therefore ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed with costs.

ELKINS vs. ZACHARIE.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Clerical errors when they appear merely as such in entering orders, &c. ought not to be allowed to affect the rights of the parties, and should be disregarded.

Where a debtor is imprisoned on a judgment and execution exclusively in the name of the plaintiff, although others may have an interest therein; and after having given bond for the prison limits, the plaintiff in execution gives him a written "*consent as far as he is interested,*" to "absent himself for ten days, of which the debtor avails himself and leaves the prison limits without consulting the other persons interested, the surety in the prison bond is thereby discharged.

The plaintiff in execution for whose benefit the prison bond is taken, is the only person who can control its conditions, and his consent that the debtor be absent only for ten days, forever discharges the surety.

This suit was instituted on a prison bond, against the defendant J. W. Zacharie as surety of H. W. Palfrey, for the prison limits of the parish of Orleans, on an allegation and preliminary proof that the latter had departed from said prison limits contrary to the tenor of his bond and without the order of the court or the consent of the plaintiff. Judgment was prayed against the surety for the amount of the original debt, interest and costs, on the ground that the bond was forfeited and the surety liable.

The surety pleaded the general issue; and that Palfrey was permitted to leave the prison bounds by the order and consent of the plaintiff, and by reason whereof he as his surety was discharged.

It was agreed at the trial that the defendant be considered as having pleaded Palfrey's discharge from his debts, (after *cessio bonorum*) by the necessary vote of his creditors in number and amount in March 1833; and before the present suit was instituted.

On the trial two bills of exception were taken to the opinion of the court. 1st. By the defendant's counsel to the admission of the prison bond sued on, *in evidence*, because the *exparte order* directing the sheriff to assign the bond to the plaintiff, bore date the 3d of June 1833, and referred to a bond dated the 8th of June 1833, instead of the 8th June 1831, the *true date*. The objection was overruled on the ground that the discrepancy in dates was a mere clerical error. 2. To the rejection of Palfrey, offered as a witness for defendant on the score of interest. The defendant's counsel resisted the objection on the ground that Palfrey was indifferent, as he was neither liable to plaintiff or defendant in consequence of his discharge from this debt under the insolvent laws.

The plaintiff produced the bond sued on in evidence, and proved the departure of Palfrey from the prison limits.

The defendant offered in evidence as a justification of Palfrey's leaving the prison limits, and as operating the discharge of his surety, the following written note from the plaintiff.

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"To George Eustis, esq."

"Mr. Palfrey wishes to leave the city for his family to be absent ten days. As far as I am interested in the suit against him I consent to suspend proceedings for that period, and that he be absent that time."

(directed on the back)

S. Elkins."

"To George Eustis, esq."

"20th October 1831,"

"Present."

This note was open, written and given to Mr. Palfrey to be, by him, handed to Mr. Eustis. The evidence shows that Palfrey never delivered this note; that he looked for Mr. Eustis and not finding him, immediately showed it to Mr. Holland the deputy sheriff, and asked his opinion if it was sufficient authority to allow him to depart, who replied he thought it was. Palfrey then left the prison limits.

It was in evidence that the original judgment and execution upon which Palfrey was imprisoned stood alone in the name of the plaintiff, but that Mr. Eustis and others were *interested* in said judgment; that Mr. Eustis was also the counsel who obtained the judgment and managed the suit; and that the plaintiff in the present suit alleges, and has proved, that George Eustis and the heirs of Henry De Ende, deceased, were interested in said judgment against Palfrey, "and for whose use and benefit, as well as in his own right he *now* sues."

The following extract from the bilan and the proceedings of Palfrey's creditors before the notary in February 1833, were also in evidence.

"H. De Ende and Samuel Elkins two notes, due in 1829-'30, for seven thousand two hundred dollars, less six thousand dollars paid."

"Samuel Elkins being duly sworn by me, notary, declared that the said H. W. Palfrey owes to him, to George Eustis, and the estate of H. De Ende, a sum of one thousand two hundred dollars and upwards, with interest, by virtue of a judgment. This appearer reserves all his rights and remedies as well against H. W. Palfrey, as against his securities

on the prison bond for breaking the limits. He grants no discharge, &c." EASTERN DIS.
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Judgment was given against the surety for the amount of the plaintiff's demand.

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The surety appealed.

Eustis, for the plaintiff.

1. The letter addressed to G. Eustis was never delivered, and the plaintiff was never bound thereby.

2. The terms of the letter did not authorise the departure of Palfrey, but implied that the assent of the other parties should be given to it.

3. The exception of the *cessio bonorum* is *personal* to the principal debtor and not available to the surety.

Slidell, contra:

1. Contended that the inferior court erred in refusing to admit Palfrey as witness; the discharge by his creditors operated as a complete extinguishment of the debt.

2. The prison bond is a mere accessory of the original debt and its obligation is also extinguished. Palfrey has no interest directly or indirectly in the event of this suit; and there is no other cause of exclusion on the ground of incompetency, all other objections go to his credibility, &c. *La. Code*, 2260. 4 *La. Rep.* 200.

3. The bond should not have been admitted in evidence, because by the 14th section of the act of 1808, requiring the court, on *due proof* of breaking the bounds, to direct the sheriff to assign the bond to the plaintiff, evidently contemplates that it shall be done contradictorily with the surety; and because the order directing the assignment refers to a bond of date the 8th June 1833, when the one in evidence bears date June 8th 1831.

4. Proceedings in a suit of this character are *stricti juris* and all the formalities of law should be rigorously observed. 7 *Mar. N. S.* 523.

5. Palfrey having left the prison bounds with the express

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written consent of the plaintiff in execution, the bond was discharged and the surety released from the obligation. 5 *John. Rep.* 365.

6. The note from the plaintiff to his attorney was an unconditional permission for the defendant in execution to leave the prison limits, because he alone was interested in the judgment. This bond was given to Elkins alone for his sole benefit.

7. There was no bad faith on the part of Palfrey in giving this note to Zacharie, and even if there was, he had a right to avail himself of it. 5 *La. Rep.* 375.

8. The release of the principal obligation by the discharge of Palfrey under the insolvent laws, extinguished the accessory obligation of the defendant.

MATHEWS, J., delivered the opinion of the court.

This suit is brought on a bond given by the defendants in which Palfrey is principal, and Zacharie surety. The bond was executed in pursuance of an act of the legislature fixing limits or bounds for the public jail of the city of N. Orleans, and authorising persons in the custody of the sheriff, whether on *mesne process* or under execution, on giving bond with good and sufficient security to obtain the privilege of the prison bounds, &c.

In the present case the action is prosecuted against the surety alone, the principal having obtained the benefit of our insolvent laws and consequently being released from civil pursuits. Judgment was rendered against the defendant Zacharie in the court below, from which he appealed.

An exception was taken on the part of the defendant relative to the manner in which the order requiring the sheriff to assign the bond was made. This exception had the appearance of some weight when first presented; but on reflection, we are of opinion with the judge *a quo*, that the error or mistake in relation to this matter was merely clerical, and ought not to be allowed to affect the rights and interest of the plaintiff in the action.

Clerical errors when they appear merely as such in entering orders, &c., ought not to be allowed to affect the rights of the parties, and should be disregarded.

As to the merits of the cause, its decision depends on the effect which ought to be given to one single fact, that is, the alleged permission granted by the plaintiff allowing the defendant in execution to absent himself, &c. The evidence fully establishes that the defendant Palfrey, who had been arrested on a *ca. sa.* and given bond as required by law to remain within the prison limits, did go beyond those limits. Unless he was authorised so to do, either by leave of the court, or by the order or permission of the plaintiff in execution, the bond was forfeited by this act of the defendant and his surety rendered liable to pay all consequential damages to the person at whose suit he had been arrested and imprisoned. But it is contended in favor of the surety, that the principal by departing from the prison bounds under the circumstances in which it was done did not break his covenant, and consequently no obligation was imposed on the surety to pay the penalty, or make satisfaction to the plaintiff on account of injury done or damages suffered by him. Because the violation of the conditions of the bond was the consequence of an act done in pursuance of the consent and permission of the person at whose instance the debtor was confined within the limits of the jail. The existence of this consent and permission rests on the interpretation which must be given to a note addressed by the plaintiff to Mr. Eustis his counsel in this case, and who had acted for him in obtaining the judgment and issuing the *capias ad satisfaciendum* on which Palfrey had been arrested and imprisoned. This note in the shape of an open letter was delivered to the defendant in execution and addressed as above stated. It is in the following words, "Mr. Palfrey wishes to leave the city for his family, to be absent ten days. As far as I am interested in the suit against him, I consent to suspend proceedings against him, and *that he may be absent that time.*"

The only condition or limitation contained in this instrument, is such limitation as the interest of the writer was legally subjected to, in the property which he had in the judgment and execution; and in relation to his right of control and use of them. If he had full property and

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Where a debtor is imprisoned on a judgment and execution exclusively in the name of the plaintiff, although others may have an interest therein; and after having given bond for the prison limits, the plaintiff in execution gives him a written "consent, as far he is interested," to absent himself for ten days, of which the debtor avails himself and leaves the prison limits without consulting the other persons interested, the surety in the prison bond is thereby discharged.

The plaintiff in execution for whose benefit the prison bond is taken is the only person who can control its conditions, and his consent that the debtor be absent only for ten days, forever discharges the surety.

control over this judgment and execution, then his consent that the defendant might absent himself from the prison bounds for the space of ten days was co-extensive with the interest and control which he held over the instrument which authorised the imprisonment, and the permission granted was unconditional and without limit or reserve. The judgment and *ca. sa.* under which Palfrey's confinement took place, are exclusively in the name of Elkins, in this manner the first was obtained and the last issued. They were therefore in a legal point of view entirely his property, and the measures pursued under them were severe legal steps. By his own power through the aid of the court he bound the defendant and by his individual authority he had a right to release him, which he did. The evidence of the case does not clearly show that any other persons were at the time interested in this judgment and execution either legally or equitably. Consequently to make the consent and permission granted by the plaintiffs available, did not require the concurrence of any one else; and therefore the circumstance of the note having been addressed to Mr. Eustis ought not to be permitted to destroy the right and privilege which the defendant acquired under it.

The plaintiff in execution for whose benefit the prison limits bond was taken is the only person who had power over its conditions; he consented to release them, (at least temporarily,) he agreed to let the defendant go at large for the period of ten days; he was willing that his adversary should enjoy his liberty, should be released from the restraint imposed by the bond. *Volenti non fit injuria.* By this consent the surety was discharged from all obligations created by that bond; and being once discharged it could never have effect against him afterwards.

It is therefore ordered, &c., that the judgment of the District Court be avoided, reversed and annulled; and it is further ordered, &c., that judgment be here entered for the defendant, Zacharie, with costs in both courts.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The heir who is present is subrogated to the rights of those absent, and whose existence is not known, and is entitled to receive the whole succession.

The correctness of the judgment of the Court of Probates cannot be questioned in the District Court.

The attorney of the absent heirs is the proper person to represent them in all cases where they are interested, even after the executor or curator of the estate is discharged.

The attorney of absent heirs does not become *funtus officio* by the discharge of the testamentary executor.

The plaintiff alleges he is the transferee by notarial act of all the rights of J. M. Benoit, and his two brothers to the succession of the late Eloï Hacher, who were his heirs instituted by his will; that A. Reggio the late husband of the defendant confessed judgment, by notarial act, which is annexed, and acknowledged to be indebted to said succession in the sum of seven thousand dollars, payable at the expiration of five years from the 29th of February 1828; and the defendant widow Reggio, common in property with her minor children are bound for the payment of said sum. He prays that the widow Reggio in her own right and as tutrix of her said minors, be adjudged and decreed to pay said debt with interest and costs.

The defendant pleaded a general denial; and that the transfer of Hacher's succession is void, because the person (J. M. Benoit,) making it did not represent all the heirs and that it was made without consideration; even admitting the transfer and judgment to be binding the plaintiff cannot enforce his claim in the manner and for the amount set forth; and finally that, although the execution under the

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will of Hacher has been discharged, without collecting all the debts due his succession, the plaintiff as transferee is not authorised to enforce their collection; but that the will must be executed, and the forms of law prescribed in such cases be observed.

On the trial and from the evidence adduced thereon, the case appears as follows: Eloi Hacher made his will in 1824, in which he bequeathed legacies to the amount of three thousand five hundred dollars, and instituted his three nephews, J. M. Benoit, Paul F. Benoit, and P. Benoit, his heirs, with the right of accretion to the survivors or survivor of them, if any of them died before him. An executor was appointed. The succession was opened in the parish of St. Bernard, and an inventory made in 1829; the executor continuing in office by successive orders of the Probate Judge, until finally discharged in 1833. The plaintiff soon after brought suit against the attorney for the absent heirs of Hacher, claiming the succession on the assignment of J. M. Benoit (the other two brothers supposed to be dead,) transferring all the rights of said heirs to him, and claiming to be put in possession thereof. He was put in possession accordingly, and among the debts to it was the one now claimed.

On the part of the defendant it is insisted that the attorney of the absent heirs did not and could not represent the succession; that some representative should have been appointed contradictorily with whom the plaintiff should have asserted his claims, and that the decree rendered putting him in possession would not protect the defendant in paying the debt.

The district court had some doubt from article 1210 of the *Louisiana Code* which seemed to require the attorney to go out of office when the executor was discharged; but article 1655 provides that he cannot discharge himself until the succession is liquidated, and article 1654 makes it his duty to take care of the interests of the absent heirs, &c. The court considered the attorney for the absent heirs in office, and the only proper defensor against the plaintiff. Judgment was

rendered in favor of the latter for the distributive share of the heirs of Hacher after paying the legacies.

The defendant appealed.

The case was submitted without argument by *Mr. Pichot* for the plaintiff, and *Mr. Derbigny* for the defendants.

MARTIN, J., delivered the opinion of the court.

The plaintiff states that one Hacher made his last will and testament, and after bequeathing several legacies, the residue of his estate he gave to his three nephews with the benefit of accretion to the survivors or survivor of them; and that the legacies were paid by the testamentary executor, who liquidated the estate and who was discharged by the Court of Probates. That one of the instituted heirs and residuary legatees, transferred, for a valuable consideration, all his right and interest in the succession to the plaintiff, (the other two heirs their existence being unknown, or being dead,) who was by the Court of Probates of the parish of St. Bernard where the succession was opened, put into possession of the estate; that one of the defendants, (widow Reggio) is in community with the minor children and heirs of Reggio are indebted to the estate transferred to him and refuse payment. Wherefore he prays judgment, &c.

His claim has been resisted on the ground that the attorney of the absent heir, did not and could not represent the succession; and that some representative ought to have been appointed contradictorily with whom the plaintiff might have asserted his claim; and as this was not done the decrees of the Court of Probates in favor of the plaintiff could not afford sufficient protection to the defendants against the claim of his transferor's co-heirs if they ever appeared.

There was judgment for the plaintiff, and the defendants appealed.

We have not been favored with any arguments on the side of the appellants. The counsel of the appellee has filed the following points.

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The heir who is present is subrogated to the rights of those absent, and whose existence is not known and is entitled to receive the whole succession.

The correctness of the judgment of the Court of Probates cannot be questioned in the District Court.

The attorney of the absent heirs is the proper person to represent them in all cases where they are interested, even after the executor or curator of the estate is discharged.

The attorney of absent heirs does not become *functus officio* by the discharge of the testamentary executor,

The *Louisiana Code*, art. 78, has a positive provision under which the plaintiff as transferee of the heir present, and as subrogated to the right of those absent, whose existence is not known, is entitled to receive the whole succession.

The correctness of the judgment of the Court of Probates cannot be questioned in the District Court. *Code of Practice* 608.

The attorney of the absent heirs was the proper person to represent and defend them in a suit in which they were interested.

He did not become *functus officio* by the discharge of the testamentary executor. *La. Code*, 1210, 1654 and 1655.

It has appeared to us the judge of probates did not err in rendering judgment for the plaintiff.

It is therefore ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed with costs.

JOUBLANC vs. DAUNOY.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a person contracts with a workman to build several houses for a certain price payable at fixed periods, and discharges him before the completion of the edifices, and it is in proof the work was well executed, the latter will recover the full amount of his work and labor done as on a *quantum meruit*.

The plaintiff sues to recover three thousand seven hundred dollars from the defendant which he alleges is the balance due him of the price of building three houses for her, in pursuance of an agreement between them. The plaintiff alleges

that he contracted with Miss Daunoy to build her three houses in the city of New-Orleans, for the sum of nine thousand and seventy-five dollars; that he went on to perform faithfully his work until near the close, when he was ill-treated and discharged by the defendant; that the work which he actually done on said houses amounts to nine thousand dollars, of which sum five thousand three hundred dollars has been paid to him, leaving a balance of three thousand seven hundred dollars unpaid, which the defendant refuses to pay and for which he prays judgment.

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The defendant pleads a general denial; admits she employed the plaintiff to build her houses according to certain written contracts annexed; one made on the 8th of April 1833, for the building of two houses, &c. for two thousand five hundred dollars each; and the other the 29th of August for the construction of a house and out-buildings for three thousand seven hundred and fifty dollars. She charges that the plaintiff done said work so negligently, unskillfully and in such an unworkmanlike manner, that she was compelled to employ other workmen to complete the work, and that she has sustained an actual damage in the delay and expense of paying other workmen to finish the houses, &c. to the amount, over and above what the plaintiff done and received, three thousand and fifty dollars, for which she prays judgment in reconvention.

The district judge was of opinion from the evidence, that the plaintiff was prevented by the defendant from completing the work. She repeatedly harrassed the plaintiff with threats and finally told him in the presence of his workmen to quit the work, and speaking to the workmen, she told them to quit working on her buildings, that she would not pay them. The workmen all ceased to work in consequence thereof.

The plaintiff is a man of color, and the defendant's nephew acted as her agent, between whom and the workmen there appears to have been no difficulty, but the defendant interfered and countermanded his orders. It was in proof that she invited the plaintiff to return and complete the contract

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There were two sets of experts called on to estimate the value of the work done, from whose different estimates the district judge was of opinion there was a balance due the plaintiff of two thousand five hundred dollars, and gave judgment accordingly.

The defendant appealed.

The plaintiff in his answer joined in the appeal and claimed the amount as prayed for in his original petition.

Canon, for the plaintiff and appellee.

The proprietor may cancel at pleasure the contract with an undertaker to build; but in doing so the contract is dissolved in all its parts, and the latter can recover the full amount of his work and labor done by other evidence than that of the written contract. *La. Code 2736. 2 La. Rep. 331.*

Roselius, for the defendant.

1. The District Court erred in its judgment, because the contracts were not cancelled by the defendant, but were violated by the plaintiff.

2. Even if the plaintiff was dismissed by the defendant the amount allowed him is exorbitant and not supported by the evidence. The contract, though not conclusive evidence, yet it affords strong proof of the real value of the work. *2 La. Rep. 331. 5 ib. 260.*

3. At all events the plaintiff is not entitled to receive more than was allowed in the estimate of one of the experts amounting to one thousand four hundred dollars.

MATHEWS, J., delivered the opinion of the court.

This is a suit to recover from the defendant the value of certain labor done and materials furnished in building several houses, which the plaintiff undertook to construct and finish for prices fixed by contracts which are alleged to

have been violated by the defendant in forbidding the undertaker to proceed to complete the works agreed on, after he progressed in the undertaking nearly to its completion, &c. The court below gave judgment for the plaintiff, from which the defendant appealed.

The decision of the cause depends mainly on matters of fact. The evidence is somewhat contradictory, as generally happens in cases of this kind.

The court below concluded from the whole testimony, giving to each part such right as was considered reasonable, that the contract had been violated by the conduct of the defendant, and was no longer binding on the parties, and that the plaintiff was consequently entitled to recover as on a *quantum meruit* the value of the work by him actually done and the costs of materials furnished. By a calculation in pursuance of these premises the sum due by the appellant was ascertained and judgment accordingly rendered. We have examined the testimony and the law of the case, and are unable to discover any error either in the principles assumed or the conclusions of the court below.

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Where a person contracts with a workman to build several houses for a certain price payable at fixed periods, and discharges him before the completion of the edifices, and it is in proof the work was well executed, the latter will recover the full amount of his work and labor done as on a *quantum meruit*.

It is therefore ordered, &c. that the judgment of the District Court be affirmed with costs.

GODDARD'S HEIRS vs. URQUHART.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The prescription under the Spanish law, of debts on simple contracts resulting from chirographory or private instruments of writing is *ten years*.

The *Civil Code* of 1808, art. 65, p. 486, which provides that *all actions, &c.* are prescribed after thirty years, does not repeal the previous law which prescribes personal actions, debts on simple contracts, &c. after a lapse of *ten years*.

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residing out of the state.

Where the law is changed after prescription begins to run, the time which elapsed under the law preceding the alteration is to be computed according to that law, and that which follows is to be reckoned according to the new law; and the time acquired under the old law is to be added to that acquired under the new law, in the proportion that each time bears to the term required by the old and new laws.

So in a personal action in which the prescription under the Spanish law is ten years, and nine years and seven months having expired, and only five months wanting, at the promulgation of the *Louisiana Code* in 1825, which changed the prescription of personal actions as running against absentees to twenty years: held that ten months is required under the new law to complete the prescription.

In an action on a notarial instrument, executed by the defendant to a third party to raise a mortgage when he had surrendered up the debt for which the mortgage was given, but in which he acknowledges the receipt of the money; after a lapse of twenty-three years before suit, a jury may well infer from this great length of time, corroborated by circumstantial proof that the debt never existed, or has been paid, and their verdict for the defendant will not be disturbed.

This is a personal action on a notarial instrument of writing, instituted against Thomas Urquhart, and commenced by Wm. F. Goddard a citizen of South-Carolina in 1830, in which he claims five thousand and ten dollars, as the amount acknowledged to have been received by the defendant in said act.

The record and evidence shows, that in the year 1805, one John Almond died, intestate, in the Territory of Orleans, leaving a considerable property, consisting principally in slaves and some land. Thomas Urquhart was appointed the administrator of his estate, and caused the property to be sold on a credit of twelve months; the slaves and lands remaining mortgaged until payment. Among the notes taken by the

administrator for the price of slaves sold, was one given by judge Prevost, for five thousand and ten dollars, and secured by a mortgage on the slaves purchased by him.

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In March 1806, one John Paisley, (the husband by a second marriage, of Almond's only daughter and sole heir,) came to Louisiana from South-Carolina, with full powers to receive the estate of Almond. On the 25th of March 1806, Thomas Urquhart rendered his account as administrator, which was received, and the Superior Court for the Territory of Orleans ordered the effects and monies belonging to said estate to be paid over to Paisley, which was done, and Urquhart discharged as administrator and his bond cancelled.

On the 8th July 1807, Urquhart signed an act of the following purport:

"Pardevant nous, Pierre Pédesclaux, notaire public, &c.: Fut présent le Sr. Thomas Urquhart, négt., demeurant en cette ville; lequel en sa qualité d'exécuteur testamentaire de feu Jean Almond, reconnait avoir reçu du Sr. Jean B. Prevost la somme de cinq mille dix piastres pour autant que le dit Sr. lui devait, par acte à notre rapport daté du six Mars mil huit cent six, au moyen duquel payement, le dit Sr. Urquhart en sa dite qualité s'est désisté et séparé de tous ses droits et propriétés, acquis et quitte le dit Sr. Prevost du montant des clauses au dit acte du six Mars, donné main levée pure et simple de l'hypothèque consentie en sa faveur et souffert que radiation en soit faite sur le registre conservateur et partout ou besoin sera, dont quittance requise et octroyée."

"Fait et passé en notre étude à la Nouvelle-Orléans, le jour et an que dessus, en présence des Srs. J. B. Ramirez et Joachin Lozano, témoins qui ont signé avec le Sr. comparant et nous notaire. La minute est signée." Thomas Urquhart, executor of John Almond. J. Lozano, J. B. Ramirez, Pierre Pedesclaux, notary.

Upon this act suit was brought. Thomas F. Goddard the original plaintiff, was the only surviving child and heir of Mary A. Almond, by her first marriage with William Goddard of South Carolina. She nor the plaintiff ever

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resided in Louisiana. Mary A. Almond, afterwards Mrs. Goddard, and finally Mrs. Paisley was the only child and sole heir of John Almond, deceased, whose estate was administered by the defendant.

John Paisley, her husband, came to Louisiana and received the estate as her legal representative, in March 1806. The note of judge Prevost was surrendered up to him with the other effects. Mrs. Paisley died the July following, in South Carolina, and John Paisley in December following, (all in 1806) shortly after his return to to South Carolina.

Thomas F. Goddard, the plaintiff, was born November 8, 1794, was of full age in 1815, and instituted this suit fifteen years afterwards, in 1830. He died *pendente lite* and his heirs have continued the litigation to its conclusion.

The defendant pleaded the general issue and prescription.

On the trial the plaintiff offered the act sued on in evidence; also the act of sale and mortgage of the slaves purchased by judge Prevost in 1806, at the sale of Almond's estate, reciting the note which he gave for the price in the sum of five thousand and ten dollars; and likewise the record of the suit in the Territorial Court, of *Paisley vs. Urquhart*, in which the latter renders an account of his administration and surrenders up all the notes and effects of Almond's estate to Paisley, Prevost's note being included. The plaintiff also produced an act signed by Paisley in May, in 1807, in which he appoints Urquhart his attorney in fact to act for him, but no mention is made of any debts left for collection, or is there any evidence that Urquhart ever acted under it; he did not sign the act or accept of the agency. The defendant offered the books of T. and D. Urquhart (which were offered, likewise in evidence by the plaintiff,) in which all the transactions in the administration of Almond's estate were regularly entered and carried through until the close and discharge of the defendant by order of court. The note of Prevost with all the others taken for the sale of the estate of Almond are entered, specified and delivered up. This note or its proceeds never

again appears in these books. Another note on Reed and Lilly for three thousand three hundred and twenty four dollars, which was included among those delivered up to Paisley, was afterwards discounted by T. & D. Urquhart and passed regularly through the books of the firm. David Urquhart who also testified for defendant, states that he was intimate with his brother's affairs, they done all their business together, and he never heard of this debt of Prevost's after the note was surrendered up to Paisley. He was so familiar with all their business that he thinks it hardly possible that his brother could have received this sum without his knowledge. Other circumstances were adduced as negative proof that the defendant never received the amount of Prevost's note.

The jury returned a verdict for the defendant; after discharging a rule for a new trial, the District Judge gave judgment confirming the verdict.

The plaintiff appealed.

Preston, for the plaintiff and appellant.

1. Contended that Urquhart received the sum claimed, at the date of the act sued on in *July 1808*; and that this suit was instituted in 1830, between which twenty-two years have elapsed.

2. This is a personal action, and according to the *Civil Code* of 1808, art. 65, p. 486, "after thirty years all actions either personal or real are prescribed."

3. This provision of the *Civil Code* in force during the time of this claim embraces the present suit which is a personal action. There is no special provision in the Code or in the Spanish law as to the prescription of an action for money received on a *bond* and *mortgage* for the price of slaves.

4. If there be merely a general provision of the Spanish law that personal actions are prescribed by ten years, I contend that the general provision of the *Civil Code* of 1808, repeals by superceding it.

5. The latter is a later provision of the law on this subject

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to which the former law must yield. The affirmation that a personal action is prescribed by thirty years is a negation that the same action is prescribed by a shorter period. The new law is irreconcilable with the old. *Civil Code, art. 29, p. 6.* 7 Mar. N. S. 108.

6. The laws of Spain were the same as to the prescription of debts as provided in the *Civil Code* of 1808. *Partida 3, tit. 29, l. 22.*

7. The 63d law of *Toro* afterwards fixed the prescription of personal actions not at ten years as is contended for on the other side, but at twenty years. It is the right of execution on a personal obligation, not an action on a personal obligation which this law prescribes in ten years. *Nov. Rec. book 4, tit. 15, l. 6.*

8. *Febrero* comments at large on this law which is a little obscure, and establishes conclusively that the personal action is prescribed only by twenty years; but leaves it doubtful whether that twenty years does not commence only after the prescription of the executory process by ten years, which would make the whole prescription thirty years as in the *Partidas*. *Febrero, p. 1, ch. 7, sec. 4, nos. 72, 73, 74 and 75.*

9. *Gomez* in his commentary upon the law of *Toro* seems to think it may stand with that of *Don Alonzo* in book 3d. tit. 13, law 3 of the *Ordenamiento Real*. But it is entirely inconsistent with that law and supercedes it.

10. On an inspection of the original law of *Toro* it will be seen that the prescription established by *Don Alonzo* is expressly repealed, and consequently is not noticed in the *Partidas*, nor by *Lopez* or *Febrero*.

11. This law was published by the cortes held in *Toro* in 1505, but the *Partidas* was often subsequently republished and sanctioned by Spanish authority. *Vide Ord. Philip II. of March 1567* in the beginning of the *Recopilacion*, also *Rec. book 2, tit. 1, law 3.*

12. This action was not prescribed under the law of *Toro*. In 1808 when the money was received, *Goddard* the plaintiff was a minor about fourteen years of age. He came of

age in 1815, and therefore the prescription of this, his personal action has not occurred.

13. The adoption of the *Louisiana Code* in 1825, changed the prescription of personal actions to ten years when present, and twenty if absent, and repealed the Spanish law. The new Code cannot act retrospectively, and therefore does not bar the present action. *La. Code*, 3508.

14. On the merits, this case rests on an authentic act acknowledged by the defendant, of the receipt of money belonging to the plaintiff's ancestor, and raising a mortgage given to his estate.

Curry, for defendant.

1. Thomas Urquhart is sought to be made liable for the amount of a note given by judge Prevost to him as administrator of Almond's estate, for the purchase of certain slaves. It is in proof that this note was surrendered up to Paisley in March 1806, and no evidence is produced that it ever after came into his hands.

2. The act sued on was signed by Urquhart the 8th July, 1807, more than a year after Prevost's note was given up, and is a simple instrument raising the mortgage and acknowledging to Prevost that the money was received.

3. Upon the very face of the act, it being made single for the sole purpose of raising Prevost's mortgage, the clause acknowledging payment was evidently inserted to comply with the forms of law.

4. This is not a question of the force and validity of an authentic act, which by our law makes full proof between the parties to it, of the obligations contained in it.

5. The act is in favor of judge Prevost, and as between them the defendant would be estopped from disputing the obligation it contains as to the release of the debt and extinguishment of the mortgage.

6. But as to all other persons not parties to the instrument, as the parties to this suit, it is merely an extra-judicially admission, which by its very terms is founded in error.

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This admission stands on the same footing with that of any parol admission, and its validity must be tested by the same rules of evidence.

7. Then neither the plaintiffs or their ancestors in whose right they claim, were parties to this act. The plaintiff's counsel admits it was signed by Urquhart, for the purpose of raising a mortgage given to the estate of plaintiff's ancestor.

8. This was the sole object; but it was signed in error, for though Urquhart is styled in the act "*executor testamentaire*," and to his signatures is affixed "executor of John Almond," he never was executor; being appointed in the first instance *administrator only*.

9. Thomas Urquhart never received the money he is charged with, because Prevost's note was not in his possession; it was delivered up, and no vestige of it or its proceeds ever after appears in any of the evidence, except what is attempted to be inferred from the act sued on.

10. There is negative proof that Urquhart never received this money arising from the lapse of time, the negative silence of the books of T. and D. Urquhart, through which all their money transactions passed, and a mass of circumstantial evidence.

11. An intelligent jury on hearing all the testimony, have pronounced a verdict for the defendant and the district judge, before whom the case was tried, was fully satisfied of the correctness of the verdict, and refused a new trial.

12. This court has said where a case presents no question of law, but merely one of fact *on the weight of testimony*, the verdict will not be disturbed, unless it is manifestly erroneous. 6 *Martin, N. S.*, 71. *Ibid.* 530. *Ibid.* 538. 3 *Martin, N. S.*, 155.

13. So in a hard action where the defendant acted with good intentions and verdict in his favor; and where the case turns on a mere question of fact and the evidence leaves it doubtful, the verdict will not be disturbed. 7 *Martin*, 371. 4 *L. Rep.* 444.

Eustis, on the same side.

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1. This claim or right of action is barred by prescription.

2. The plaintiff claims in right of his mother who was the sole heir of Almond. She inherited and was in possession of his estate at the time of her death, in July 1806. Her succession at the time the right now claimed accrued was *vacant* as respects her rights and property in Louisiana.

3. If a person dies in another state leaving property in this, and his heirs live out of the estate, the succession is *vacant* and a curator should be appointed. 1 *Mar. N. S.* 202. 12 *Mar.* 101.

4. Prescription runs against a vacant estate though no curator has been appointed. *Civil Code p. 486: art. 62, latter clause. La. Code 3492.*

5. Prescription has run in this case twenty three years against the estate, in right of which the plaintiff claims, and fifteen years after he was of age, and before the institution of this suit.

6. By the Spanish law debts were prescribed by the lapse of ten years; "*si las deudas no fueren demandados hasta diez anos que sean prescriptas.*" L. 3 of the *Ordenamiento Real. Dón Alonza en Alcala. Era 1386.*

7. This law has never been repealed. It was enacted subsequent to the *Partidas* which were first published in the Cortes of Alcala, in the year 1348. *Vide introduction to Moreau and Carlton's translation of the Partidas.*

8. The authors of that work state the *Partidas* and the *Ordenamiento Real* to have been published in the same year, viz: 1348. This is a mistake; the *Ordenamiento Real* is dated thirty eight years afterwards, viz: in 1386. This law is contained in the *Teatro de legislacion* as being still in force. Vol. 24, sec. 10.

9. It is expressly recognized to be in force by the 63d law of *Toro* which made exceptions to it and renders the question of its existence as a law indisputable.

10. The laws of *Toro* were promulgated in 1505; the 63d is as follows: "El derecho de executar por obligacion per-

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sonal se prescriba por diez anos; y la accion personal y la executoria dada sobre ella se prescriba por veinte anos, y no menos: pero donde en la obligacion hay hipoteca, o donde la obligacion es mixta, personal y real la deuda se prescriba por treinta anos, y no menos: lo qual se guarde sin embargo de la ley del Rey Don Alonzo nuestro progenitor, que puso, *que la accion personal se prescribiese por diez anos.*" (*ley 6, tit. 15. lib. 4 R.*) 3 Nov. Rec. lib. 10, tit. 8, *ley 5, p. 196.*

11. This law is contained in the *Novissima Recopilacion* published in 1805, which is the highest and most conclusive testimony as to the authority of the *Ordenamiento Real* being still in force.

12. Gomez in his commentary on the law of *Toro* considers this law of the *Ordenamiento Real* as in force when he wrote. He says; "Ex quibus datur nota intelligentia et declaratio, (*ad leg. 3 titul. 13 lib. 3 Ordin.*) qua cavetur, quod actio vel obligatio personalis tantum durat per 10 annos: ut intelligatur, quando continetur in chirographo et scriptura privata: and sic non corrigitur per istam: et illa lex est utilisima et potest practicari cum bona conscientia, quando quis solvit et non potest probare, vel aliter satisfacit creditori." *Commentary of Gomez* 641.

13. The learned translator of the Civil Laws of Spain considers simple personal obligations to be prescribed in ten years. *p. 109.*

14. The rule of construction as to the repeal of laws established by Royal Ordinance by Philip V. in 1714, shows conclusively that this law of the *Ordenamiento Real* is in force. 1 *Rec. Nov. Book 2, p. 11, ley 11.*

15. The instrument of writing sued on is a simple acknowledgment of having previously received money and a release of the mortgage to Prevost; the only party to it being the defendant. Except as to these objects and as between the defendant and Prevost, every thing else is *dehors* the act, and as to the plaintiffs it is a matter of proof *in pais.*

16. The act is not executive, no executory process could issue thereon; and as between the parties to this suit it is

not an instrument containing the clauses and obligations which by the Spanish law could be enforced in the *via executiva*. It is simply a personal obligation.

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17. Even admitting the prescription in actions like this to be twenty years this action is prescribed. The act by which the mortgage was released is dated July 8, 1807, so that the prescription of twenty years was complete in 1827. It is urged prescription did not run against Goddard until he came of age in 1815, as he was a minor. He claims his mother's estate which was a vacant one since 1806, when she died, and prescription runs against vacant estates.

18. By the *Partidas* prescription run against minors when not under the paternal power. *Partida 3, tit. 29, l. 8. Com. G. Lopez*. The minor lived in a common law state, was not prevented from suing, particularly as he was not under the paternal power.

19. The prescription under the Spanish law was interrupted by the promulgation of the Louisiana Code in May 1825. In relation to the plaintiff's claim the prescription under both systems was the same. Under the Code it run against vacant successions, and barred all personal actions by the lapse of ten years, when present, and twenty years against absentees.

20. It is a well settled as well as an equitable principle in relation to prescription, that the change of law does not deprive parties of the benefit of the *time* of prescription acquired, although the term be not completed. The time acquired under the old law is to be added to that acquired under the new law, in the proportion that each *time* bears to the *term* required by the old and new laws. The *Napoleon Code* expressly declares how prescription is to be computed in the concluding article (2281.)

21. But in cases of *delits contraventions et crimes* the question was left to be decided on principles of law, and by these principles the rule stated has been established and acted upon by the court of Cassation in France. *Vide Merlin's Rep. de Jurisprudence (ed. of 1827) Verbo Prescription sec. 1. s. III. vol. 23, 24, page 100 and seq. See cases of Jean Tisquet and others.*

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22. From what has been said the following conclusions are clearly deducible:

1. That on the merits this case is with the defendant; and the verdict of the jury should not be disturbed.

2. The Spanish law as well as the *La. Code* declares that the prescription of personal actions is *ten years*.

3. That in this case, the cause of action arising out of a vacant estate, prescription runs from the date of the act sued on.

4. That by the Spanish law, prescription run against minors not under the paternal authority.

5. That this case is barred by the prescription of ten and twenty years.

6. That according to the principle acted on by the court of Cassation in France, the prescription acquired under the old law is computed as so much in proportion to the whole time, acquired under the new.

Preston, in reply and conclusion for the plaintiff.

1. There is but one point in the argument of defendant's counsel to which any thing can be added in reply. It assumes that this claim is for a vacant estate of plaintiff's mother, and invokes our law of prescription as applicable to and running against vacant estates.

2. If this claim were the vacant estate of the ancestors of Goddard, his acceptance of the estate would have "a retro-active effect, that is to say, he would be considered as having taken possession of the estate at the time the succession was opened by the death of his mother," and being a minor from that period his minority would interrupt the prescription. *Old Code* p. 160, art. 72.

3. But the real fallacy of the argument consists in considering this claim, the vacant estate of Goddard's mother. Her estate was not here, but in South Carolina; it was not vacant, but descended to Thomas F. Goddard, proved to be her only heir; the demand against the defendant was not the estate but a claim belonging to the estate or rather to the minor.

4. It is an error from the very beginning of the defence to apply the provisions of our law *made* for minors and their property who are residents in Louisiana, to minors abroad for whom they were not made, and with regard to whom it is impossible to carry one half the provisions into effect, as a few minutes reflexion upon them would teach.

5. The true view of this case is this: did Mr. Urquhart receive five thousand dollars belonging to the grand mother of the defendants? Have they succeeded to their grand mother in South Carolina? If so, the claim is a right personal to them there. Who can sue for them here? Their mother? Is the claim barred by prescription under our laws? I have shown it is not.

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MARTIN, J., delivered the opinion of the court.

The facts of this case are as follow : John Almond died in the territory of Orleans, in 1805; leaving a daughter who lived in South Carolina, who was at first married to William Goddard, by whom she had a son Thomas F. Goddard; on the death of whose father, his mother married John Paisley. She being the sole heir of Almond, whose estate was administered by the defendant, who early in 1806 sold several slaves, part of the estate, to judge Prevost, and took his note at twelve months for the price. Soon after Paisley came to Louisiana, and the defendant rendered him an account, which was examined and approved by the court, which ordered him to pay the balance and surrender all the notes and papers of Almond's estate to Paisley. This being done the defendant was discharged from the administration and his bond cancelled. During the summer of the following year, the defendant by notarial act raised the mortgage he had taken on the slaves sold to Prevost, and acknowledged the receipt of the consideration of the sale as *executor* of Almond. Paisley and his wife died soon after the discharge of the defendant, in the summer and fall of 1806. In 1830 Thomas F. Goddard, Mrs. Paisley's only son by her first husband, and the grandson of Almond, brought the present

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suit for the recovery of five thousand and ten dollars, the price of the slaves sold to Prevost.

The defendant pleaded the general issue; and that he had long ago paid over all the monies and effects he had received on account of Almond's estate; and finally opposed the plea of prescription.

The first jury could not agree on a verdict: a second found for the defendant. An unsuccessful effort was made to set aside the verdict, but the District Court declaring itself satisfied with it, gave judgment accordingly.

Thomas F. Goddard died *pendente lite*; his heirs came in and are the appellants from the judgment.

Their counsel has contended that it is clearly proved that the defendant received the money claimed, that there is not a tittle of evidence that he paid it, and it is in proof that the appellants are entitled, mediately through their deceased father, to the estate of Almond, their great grand-father: that the original plaintiff was born in 1794, and became of age in the month of November, 1815, so that at the inception of this suit prescription did not bar the claim, and the action thereon: the promulgation of the Louisiana Code in the spring of 1825, having established the period of *twenty years* for the prescription of his claim as he resided out of the state, and the code having abrogated all prescriptions not mentioned in the code itself.

On the part of the defendant and appellee it has been contended, that this action is prescribed; that by the law of the *3d Partidas*, tit. 29, l. 22, *thirty years* is the period, the lapse of which operates the prescription of debts, but this was altered by the *Ordenamiento Real*, 3, 13, 3, promulgated in 1386; *thirty years* after the *Partidas*; and that all debts are by this last law declared to be prescribed by the lapse of *ten years*. The 63d law of *Toro*, however, changed the period as to debts resulting from instruments importing a confession of judgment, leaving the period of *ten years* that of prescription as to the right of suing out execution in the *via executiva*, and extending the period for bringing the personal action in the *via ordinaria* to *twenty years*, &c.

Gomez, in his commentary on the 63d law of *Toro*, expressly states that it does not repeal the law of the *Ordenamiento Real*, with regard to debts resulting from chirography or private writings, which he says are still prescribed by the lapse of ten years. When the 63d law of *Toro* was placed in the *Recopilacion*, a clause was inserted that the period of twenty years, is that of the prescription, notwithstanding the law of the *Ordenamiento Real*; a clause which the counsel considers as indicative of the opinion of the sovereign, that the law of the *Ordenamiento Real*, afforded the legitimate rule of decision in all cases before the law of *Toro*; and that it is repealed in those cases only, in which the law of *Toro* operates, *i. e.* in cases of debts resulting from an instrument importing a confession of judgment.

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The counsel has contended further, that the notarial act by which the defendant raised the mortgage on the slaves is not as to the parties to the present suit, an instrument importing a confession of judgment; that it is *res inter alios acta*; that it proves merely *rem ipsam*, *i. e.* that the defendant made the acknowledgment which the act contains, and may be used to establish that fact, but the plaintiff's must show, *aliunde*, evidence of their right to the money.

It has been further urged that although the full period had not elapsed for the acquisition of prescription, a few months more being wanting, the code has not deprived the defendant of the faculty of adding the time which had elapsed before its promulgation to that which has run since; reckoning each period according to the law in force at the time it ran; that when a new law alters the period of prescription, whether it makes it shorter or longer the time which elapsed before the change, is to be reckoned according to the former law and *vice versa*. Such appears to have been the practice under a decision of the Court of Cassation in France. *Merlin's Répertoire de Jurisprudence, Verbo, prescription. Sec. 1, sec. 3.*

The counsel has concluded that if the prescription was not completely acquired, the defendant might urge the long time which has elapsed between the time at which the debt,

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The prescription under the Spanish law, of debts on simple contracts resulting from chirographary or private instrument of writing is ten years.

The *Civil Code* of 1808, art. 65, p. 486, which provides that all actions, &c., are prescribed after thirty years, does not repeal the previous law which prescribes personal actions, debts on simple contracts, &c. after a lapse of ten years.

Under the *Louisiana Code*, the prescription of personal actions and debts evidenced by chirographary instruments, is twenty years against persons residing out of the state.

Where the law is changed after prescription begins to run, the time which elapsed under the law preceding the alteration is to be computed according to that law, and that which follows is to be reckoned according to the new law; and the time acquired under the old law is to be added to that acquired under the new law, in the proportion that each time bears to the term required by the old and new laws.

So in a personal action in which the prescription under the Spanish law is ten years, and seven months having expired,

if ever existed, arose, and the demand; upwards of twenty odd years, as a presumption so violent that it may be considered as full proof that the debt never existed, or that it has been satisfied.

It has appeared to us that duty does not require from this court the reversal of the judgment appealed from. The counsel has shown that the prescription under the Spanish law, of debts on simple contract under private signature was ten years; and we cannot adopt the proposition of the counsel of the appellant that the *Civil Code* of 1808, art. 65, p. 486, restored the prescription of all debts to the original standard fixed by the *Partidas*, viz: thirty years. That article shows indeed that that number of years is the *longissimum tempus*, after which all actions real and personal are prescribed; but it does not repeal prescriptions theretofore existing, although attached to a shorter length of time.

Under our present code the prescription which the defendant may avail himself, is that of twenty years.

We believe we give a sound construction to our Code, in adopting the opinion of the Court of Cassation in France, which determines that in all cases in which the article 2281 of the *Napoleon Code* was not applicable, the time which preceded the change of legislation or altering the period of prescription, should be reckoned according to the ancient law, and that which followed according to the new law.

In this manner, nine years and seven months having elapsed between the date of the act by which the defendant raised the mortgage on the slaves, and the promulgation of the *Louisiana Code*; and ten years being theretofore the period of prescription, five months were required to complete the prescription; and as under the *Louisiana Code*, the plaintiff residing out of the state, the period of prescription is twenty years *i. e.*, double what it was before, the plaintiff in the present case was bound by the lapse of ten months after the promulgation of the *Louisiana Code*.

On the merits it appears that the jury might well infer from the great length of time, to which the demand was protracted, that the debt never existed or was paid. The

testimony in a certain degree, leads the mind to the first alternative. The note of the purchaser of the slaves, had been surrendered by the defendant. From the testimony it may be inferred he did not receive the amount. His signature was wanted to raise the mortgage, and the acknowledgment that he received the money, may have been inserted in a clause of style. All this raises a suspicion that the claim did not exist; and the improbability of its having existed for nearly the quarter of a century, forms in favor of a defendant of an irreproachable character, ever able to pay every fair claim against him, *animo opibusque paratus*, a very strong presumption which was entitled to great weight with the jury.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be affirmed with costs.

HOUGH, CURATOR OF EARLE, vs. RICHARDS.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW ORLEANS.

Where no bill of exception is taken or objection made to the admission of evidence on the trial, it is too late to object to it on appeal.

The fact of the plaintiff's attorney asking the defendant for a settlement of the account between them, is evidence of an amicable demand on the latter.

The plaintiff as curator of the estate of the late Lawrence Earle, claims of the defendant five hundred and fifty-nine dollars, as a balance due the deceased for work and labor done for the latter, as an iron and brass moulder, according to an account annexed for which he prays judgment.

The defendant avers he owes the estate of Earle nothing

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and only five months wanting, at the promulgation of the Louisiana Code in 1825, which changed the prescription of personal actions as running against absentees to twenty years; held that ten months is required under the new law to complete the prescription.

In an action on a notarial instrument, executed by the defendant to a third party to raise a mortgage when he had surrendered up the debt for which the mortgage was given, but in which he acknowledges the receipt of the money; after a lapse of twenty-three years before suit, a jury may well infer from this great length of time, corroborated by circumstantial proof that the debt never existed, or has been paid, and their verdict for the defendant will not be disturbed.

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and that no amicable demand was made by the plaintiff, wherefore he prays that the suit be dismissed at plaintiff's cost as vexatious, &c. In an amended answer, he annexed an account current with Earle, in which he brings the latter in debt one hundred dollars and forty-eight cents, which he pleaded in compensation and reconvention, and prays judgment against said estate for the balance due him on said account.

The parish judge after hearing the evidence and arguments of counsel, was of opinion, that the plaintiff had satisfactorily proved as well by a book, the entries of which were made by the clerk of defendant as by other testimony, that the deceased was entitled to the sum of five hundred and forty-eight dollars and sixty-two cents.

That the defendant failed to establish his defence; and that the amicable demand was proven.

Judgment for plaintiff. Defendant appealed.

M. Millen, for the plaintiff.

Duncan, contra.

BULLARD, J., delivered the opinion of the court.

The plaintiff as curator of the estate of Earle, sues to recover of the defendant a balance alleged to be due for work and labor done in his foundry from January till June, 1833, at four dollars per day. The defendant denies that he owes any thing. In a supplemental answer he alleges that no amicable demand was made before the inception of this suit, and he sets up a claim in compensation and reconvention.

It is contended that the court below erred in allowing as evidence entries made in a book by a clerk, whose duty it was to keep the time of the workmen in the foundry. No bill of exceptions was taken to the admission of the book as evidence, nor of the testimony, to show that the entries were made by a clerk, and it appears to have been an account of

the work done, kept by an agent of the defendant himself, Having been admitted without objection, it was too late to object to it in this court. But independently of the book, it is shown that the plaintiff's intestate did the work as charged. From the 16th of March till the 1st of June, he is credited with only forty-two days work. This appears to us to account for the time said to have been lost by sickness, and with which the defendant seeks to charge him by his plea in reconvention.

It is shown that the plaintiff's attorney asked the defendant for a settlement, who replied that he owed Earle nothing. This was in our opinion sufficient evidence of an amicable demand.

We have examined the evidence in the record, and concur with the judge *a quo*, in his view of the rights of the parties.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the Parish Court be affirmed with costs.

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Where no bill of exception is taken or objection made to the admission of evidence on the trial it is too late to object to it on appeal.

The fact of the plaintiff's attorney asking the defendant for a settlement of the account between them, is evidence of an amicable demand on the latter.

SOULIE, CURATOR, &c. vs. AZERETO.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

Where there is no question of law raised, and the case is simply one of fact, and the enquiry is, whether the evidence supports the judgment, which on a close examination does not show that the judgment is erroneous, it will be affirmed with costs.

The plaintiff as curator of the estate of E. Rillieux an absentee, claims from the defendant eleven thousand five hundred dollars, as the price of work and labor done and materials

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furnished by said Rillieux in erecting three houses and four kitchens for the defendant according to a written contract between them. The plaintiff avers that the work was completed in January 1832, and tendered, which was a few months later than agreed on, but the delay was occasioned by bad weather and was provided for by the contract. He also alleges that since the absence of Rillieux he has caused an examination and survey of said buildings to be made, and finding them executed according to contract he tendered them again to the defendant who refuses to receive or pay for them; wherefore he prays judgment for the whole amount due thereon.

The defendant avers that no amicable demand was made according to law; he admits the contract for the erecting the buildings and the price as stated therein, but that the building were to have been finished and delivered in November 1831; and that they have not been completed according to contract; are leaky and put up in an unskilful and unworkmanlike manner, in consequence of which he is not bound to receive and pay for them; wherefore he prays to be dismissed. He avers that he has paid three instalments of two thousand three hundred dollars each, on account of said buildings; and also six hundred and thirty-five dollars to the father of said Rillieux, for which latter sum, together with one hundred and twenty dollars in damages per month for the delay in completing the work and until it shall be delivered to him, he prays judgment in reconvention.

Experts were appointed and an umpire to report the value and manner of the work done, &c., and several witnesses sworn who testified as to the tender made to the defendant by plaintiff and also to the manner the work was performed.

The parish judge considered a tender proved by two witnesses of the keys of said buildings by plaintiff to defendant which was putting the latter *in mora* according to law. *La. Code, art. 1905, second paragraph.*

That the defendant refused to accept the delivery on the ground that several articles of the contract were not complied

with, and that he failed to put the plaintiff in default according to the article 1907 of the *Louisiana Code*.

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That it is proved the plaintiff took the opinion of two respectable builders before tendering said buildings who stated, as they have testified, that the work was receivable according to contract.

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That after examining the testimony on both sides without impeaching the veracity or honesty of any of the witnesses, it preponderates to the side of the plaintiff.

That it appears there were some small deficiencies in the execution of the work at the time it was tendered which the sum of one hundred and fifty dollars would fully compensate, &c.

That as it was stipulated the work should be completed by the 25th of November 1831, and in default one hundred and twenty dollars per month for delay was to be charged, unless the delay was occasioned by bad weather; and the evidence showed the tender was not made until the 20th of April 1832, which after deducting for bad weather as proved, leaves four months delay at one hundred and twenty dollars per month amounts to four hundred and eighty dollars, to be taken from the price.

That it was proved seven thousand five hundred and thirty-six dollars had been actually paid by defendant, which deducted from eleven thousand five hundred dollars and after deducting the four hundred and eighty dollars for delay and one hundred and fifty for repairs, leaves a balance of three thousand three hundred and thirty-four dollars and ninety-three cents in favor of the plaintiff. Judgment rendered accordingly. The defendant appealed.

Schmidt and Soulé, for plaintiff and appellee.

Canon, contra.

MARTIN, J., delivered the opinion of the court.

The plaintiff's claim for work and labor done by Rillieux for the defendant in erecting certain houses, is resisted on the ground that the houses were not finished and completed ac-

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According to the agreement between the parties; that they were leaky and in other respects so inartificially and unskilfully erected that the defendant was warranted by law and according to his contract to refuse to receive and accept them which he did accordingly. He claimed a sum in reconvention for moneys advanced on account of Rillieux and for damages.

There was judgment for the plaintiff but he was decreed to pay the costs of suit; the Parish Court being of opinion there was no amicable demand proved which was expressly denied by the defendant.

From this judgment the defendant appealed after an unsuccessful effort to obtain a new trial. The plaintiff has prayed that it may be amended, so as to decree the payment of costs by the defendant.

Where there is no question of law raised, and the case is simply one of fact and the enquiry is, whether the evidence supports the judgment? which on a close examination does not show that the judgment is erroneous, it will be affirmed with costs.

No point of law has been raised, so that the question which the case presents is one of fact, whether the plaintiff has supported his plea by evidence; the parish judge has concluded that he has, and a close examination of the testimony does not enable us to say he erred.

It is, therefore, ordered, adjudged and decreed, that the judgment be affirmed with costs.

NOTT & CO. vs. DOUMING ET ALS.

APPEAL FROM THE COURT OF THE PARISH AND CITY OF NEW-ORLEANS.

After the dissolution of a commercial firm, a partner cannot bind his co-partners by endorsement.

Public notice of the dissolution of a partnership is good as to strangers, but not in relation to customers or others previously dealing with the firm; *they* are entitled to particular notice.

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Where public notice was given of the dissolution of a partnership and the endorsement of the name of the firm appeared to be made afterwards on the note in suit which was purchased through the agency of a broker; held that the presumption of notice to the plaintiff is in favor of the defendant and that the former was bound to *show* that he came within the exception, by being a customer entitled to particular notice.

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This suit was instituted by the endorsees and holders of a promissory note against P. Du Bertrand, Emile Douming and Henri Legendre, composing the late firm of Du Bertrand, Douming & Co. The note sued on was drawn by one P. Amirati in favor of P. Du Bertrand for one thousand four hundred dollars, who endorsed it, and then endorsed the name of the commercial firm of Du Bertrand, Douming and Co. thereon, which note was sold by a broker to the plaintiffs. Emile Douming separated in his answer and pleaded a general denial. Judgment was taken against the other defendants by default.

It appears from the evidence that the partnership of Du Bertrand, Douming & Co. was formed on the 3d of February 1833, and dissolved the 3d of April following by public notice. The endorsement was made by Du Bertrand of the name of the firm during its continuance. The note which was made payable the last day of January 1834, at the domicil of the payee, (P. Du Bertrand) in New-Orleans, was protested for non-payment on the 3d day of February. The notary states in his certificate of notice to the endorsers, "that again on the 3d day of February 1834, he gave notice of the protest to the drawer, by putting it in the post-office, directed to him at Donaldsonville, (La.) and again on the 4th to Du Bertrand and Du Bertrand & Co. endorsers, which he delivered *respectively* to themselves, &c.

The question on which the parish judge decided the case was, whether the defendant Douming, who pleaded the general issue, had been duly notified of the protest. The court decided it in the negative.

The plaintiff appealed.

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Strawbridge, for the plaintiffs.

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1. Urged that the notice was sufficient. The certificate of the notary that he had "given notice to *themselves*" necessarily implies that notice had been given to more than one of the members of the firm, consequently to all.

2. The presumption of law is in favor of the public officer having done his duty, and the words naturally imply it. 3
La. Rep. 476.

J. Seghers, for the defendant.

1. Contended that no legal notice of protest to the defendant as endorser had been shown.

2. That from the whole tenor of the notary's certificate it appears that the word *respectively* relates to the notices given to the two respective sets of endorsers on the note, viz: one to Du Bertrand and another to Du Bertrand, Douming & Co. and that by using the words to *themselves* the notary plainly meant that he gave notice to the first endorser, and that he likewise gave another notice to the second endorser, (Du Bertrand, Douming & Co. which firm no longer existed) but to whom or what member of the firm this second notice was delivered does not appear.

3. Throughout the whole of this transaction Papet acted as the agent of the plaintiffs who are the holders of the note, and who testified to the dissolution of the partnership.

[In the record sent up to the Supreme Court a mistake was made in copying the note in which it appeared to have been dated the 7th May 1833, instead of the 7th March.]

BULLARD, J., delivered the opinion of the court.

The decision of this case seems to have turned in the court of the first instance on the insufficiency of the notice of protest given to the defendant as a member of a commercial firm, by which the note was endorsed. But the pleadings

and evidence present other questions upon which we entertain less doubt than on that of notice.

The firm of Du Bertrand, Douming & Co. was dissolved on the 3d of April 1833, and public notice given in the Bee and Courier on the following day. On the 7th of May following the note in question was drawn payable to Du Bertrand personally at his domicil, it was endorsed by him, first in his own name and then in the name of the late firm and subsequently came into the possession of the present plaintiffs. The defendant being sued as endorser in his character of a member of the firm, pleads the general issue.

After the dissolution of the firm, it is clear that Du Bertrand could not bind his late partners by endorsement. Public notice of such dissolution is good as to strangers who have not previously dealt with the firm, but not as to its former customers, who are entitled to particular notice, or at least that notice should be brought home to them. *Chitty on Bills*, 47. 4 *Johnson's Rep.* 224. 3 *Day's Rep.* 353. 6 *Johnson's Rep.* 144.

It does not appear in evidence whether the plaintiffs had had any previous transactions with the firm, nor does it appear whether they had any knowledge of the published notice. They appear to have become possessed of the note through the agency of a broker, who testified that he had seen the notice of dissolution in the Gazettes but could not recollect at what time, nor could he remember when the note was endorsed.

We are of opinion that the presumption under these circumstances is in favor of the defendant, and that the plaintiffs were bound to show that they come within the exception by showing their previous dealings with the firm before its dissolution. The defendant would then be bound by the act of his partner, unless he showed particular notice to the plaintiffs.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

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After the dissolution of a commercial firm, a partner cannot bind his co-partners by endorsement.

Public notice of the dissolution of a partnership is good as to strangers, but not in relation to customers or others previously dealing with the firm; they are entitled to particular notice.

When public notice was given of the dissolution of a partnership and the endorsement of the name of the firm appeared to be made afterwards on the note in suit which was purchased through the agency of a broker: held that the presumption of notice to the plaintiff is in favor of the defendant and that the former was bound to show that he came within the exception, by being a customer entitled to particular notice.

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THE DECISION ON A REHEARING OF THIS CASE.

Before notice of the dissolution of a partnership to the holder of the partnership endorsement, notice of protest to a member of the firm is notice to all the partners.

The endorsement of a note which is negociated is equivalent to drawing a new bill; and when the endorsement is made in the name of a firm, until notification of its dissolution to the holder of the note, he has a right to regard the firm as still in existence as to the demand and notice of protest.

A rehearing was granted in this case on the ground of a mistake in the record as to the date of the note. A true copy was certified as follows: "Fin janvier prochain je payerai à Monr. P. Du Bertrand, ou ordre, a son domicile à la Nouvelle Orléans, quatorze cent piastres pour valeur reçue.

\$1400 00

Donaldsonville, 7. Mars 1833"

3d Feb'y 1834." (endorsed) "Du Bertrand, Du Bertrand Douming & Co."

BULLARD, J., delivered the opinion of the court.

In this case a rehearing was granted, on the ground that this court had been misled as to the date of the note sued on by a mistake in the copy. It now appears that the note was endorsed during the existence of the firm of Du Bertrand, Douming & Co., it being dated on the 7th of March instead of May. The question therefore to be decided is whether the notice of protest was sufficient.

It is insisted by the defendants counsel, that after the dissolution of a commercial partnership, each partner is entitled to a separate notice of protest. We think that most of the reasoning and authorities employed in the first opinion delivered in this case, will still apply under this new aspect of it. Nott & Co. now appear as having had a transaction with the firm and there is no evidence of notice to them of its d is

solution. Can a dissolution not notified to them impair any of the obligations of the partners towards them, which arose during the existence of the partnership? we think not. If the notice would then have been good, it should be considered sufficient now, even supposing that notice was not given separately to each partner. The engagement on the part of the endorsers was, that if the note was not paid at maturity, they on proof of demand of the maker and due notice to them, would pay the amount of the note. The endorsement was in fact equivalent to the drawing of a new bill. Until notification of the dissolution, the plaintiff had a right to regard the firm as still in existence as to the demand and notice.

But the notary certifies that he gave notice to the endorsers *respectively* in writing. The expression used leaves it rather doubtful whether Douming had notice personally of whether the notice to the firm was handed to some other partner of the house. Under the circumstances of the case we do not consider it material.

The judgment heretofore rendered must be set aside. And it is further ordered, adjudged and decreed, that the judgment of the Parish Court be reversed, and that the plaintiffs recover of the defendant E. Douming, one thousand four hundred dollars with interest at five per cent from the 4th of January 1834, and costs of both courts.

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Before notice of the dissolution of a partnership to the holder of the partnership endorsement, notice of protest to any one member of the firm is notice to all of the partners.

The endorsement of a note which is negotiated is equivalent to drawing a new bill; and when the endorsement is made in the name of a firm, until notification of its dissolution to the holder of the note, he has a right to regard it as still in existence as to the demand and notice of protest.

LINCOLN FEARING & Co. vs. EXECUTORS OF RUSSELL BALL.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH AND CITY OF
NEW-ORLEANS.

In a suit for the liquidation and settlement of partnership transactions and accounts, all the partners of a firm must be made parties either as plaintiffs or defendants.

EASTERN DIS. And where all the partners of several firms are prayed to be made parties to
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a suit for the liquidation and payment of the partnership concerns, and some of them reside out of the state and no representative is appointed, those who do appear may dismiss the suit for want of all the parties before the court

It is the duty of the plaintiff to bring all the defendants before the court, by provoking the appointment of a curator *ad hoc* to those who reside out of the state.

A petition of intervention in a suit will not be admitted after the trial of the cause has commenced.

Executors residing in another state, or representing a testator whose will was opened there, cannot intervene in a suit pending in this state until they cause the will to be made executory here.

This was an action commenced in the Probate Court by Lincoln, Fearing & Co., a commercial firm in Boston, against the executors of Russell Ball, deceased, for the liquidation and payment of the partnership concerns of Russell Ball & Co., which the plaintiffs allege they caused to be established in New-Orleans, in 1818, to carry on the sale and trade in hardware and ship chandlery, as a branch of their firm in Boston; that Russell Ball had charge of said establishment, but in which all of the partners were equally interested, to wit: Lincoln Fearing, J. R. Newell and B. Thomas, composing the firm of L. Fearing & Co., and Hawkes Fearing residing in Boston, and of Russell Ball then of New-Orleans; that the firm in Boston furnished to the establishment in New-Orleans at different times, goods, &c. to the amount of twenty thousand dollars; and that Russell Ball continued in possession of said stock in trade and made great profits, amounting to one hundred thousand dollars on account of said partnership, and that he refused to account or pay over any part thereof to the firm of Lincoln Fearing & Co. Hawkes Fearing, one of the partners in the firm of R. Ball & Co. in New-Orleans, died in Massachusetts, in 1826, leaving nine heirs in said state, all of age.

Russell Ball died in November 1831, and E. and J. Ball were appointed the executors of his will. EASTERN DIS.
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The plaintiffs, Lincoln Fearing & Co. pray that the executors account to them and that said partnership claims be liquidated and settled; and that the heirs of Hawkes Fearing be made parties to this suit with due citation, by due process of law, and that Lincoln Fearing & Co. have judgment for three fifths of the profits of said partnership; less the amount of profits of said R. Ball in the firm of Lincoln Fearing & Co. (three thousand dollars) being the sum of fifty seven thousand dollars, &c.

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The executors answered and denied that any partnership was established in New-Orleans; but admit that some goods were sent out from Boston by the establishment there, when Russell Ball came to New-Orleans, to be sold by him, of the amount and disposition of which they are ignorant, and require strict proof.

The plaintiffs filed a supplemental petition requiring the executors to render an account of their executorship, to cause a true and faithful inventory to be made of R. Ball's estate; and charging them with acting unfaithfully or ignorantly and mismanaging said estate; and not having given sufficient security, &c., that they be suspended in their administration, &c. To which the executors answered that the plaintiffs were not creditors; that one of them (executor) is heir and both are attorneys in fact of the other heirs of said estate, and that they do not choose to be at the expense of making an inventory; and deny all the other allegations in the supplemental petition.

The court required the inventory to be made as prayed for. The trial of the cause commenced. An answer was tendered on the part of the heirs of H. Fearing, signed by counsel, disclaiming to interfere in the cause, but which was rejected.

After the cause had progressed from time to time in the Probate Court, on the 25th May 1832, a petition of intervention by the executors of Hawkes Fearing was allowed to be filed, joining the plaintiffs, and praying that their share

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may be ascertained and paid by the executors: much testimony was taken to establish the claim of the plaintiffs. On the 17th May 1834, the cause came on for final trial; after it had progressed, a motion was made by defendant's counsel to dismiss the suit on the ground that all the parties were not properly before the court.

The judge of probates was of the same opinion; that by the 116th article of the *Code of Practice*, when a party intended to be sued is absent and not represented in the state, the plaintiff must demand that a curator *ad hoc* be appointed; that although the plaintiff prayed for citation and all due process of law against the heirs of H. Fearing, he did not mention whether said heirs were or not represented, and did not demand the appointment of a curator *ad hoc*; that the trial having progressed on the merits, it was not in the power of the court to continue the cause for proper parties: it was dismissed accordingly.

The plaintiffs appealed.

Maybin and Eustis, for the plaintiffs.

Pierce and Preston, *contra*:

MATHEWS, J., delivered the opinion of the court.

In this action the defendants are called on to render an account of certain partnership business alleged to have been carried on between the testator and the plaintiffs, and to pay to the latter their portion of mercantile profits which were gained by the trade that was conducted by the testator in the city of New-Orleans, as one of the partners of the firm composed of Lincoln Fearing & Co. The plaintiffs all reside out of the state, and also the heirs and representatives of Hawkes Fearing (who was a partner,) and whom the petitioners prayed to be made parties to this suit. The executors filed an answer in which they deny the principal allegations of the petition. On these pleadings the parties went to trial without any appearance or answer on the part of the heirs of Hawkes Fearing,

until the trial was nearly concluded, when an answer was tendered by their attorney disclaiming any interest in the cause. The court on opposition of the other defendants refused to admit this answer, and they moved to dismiss the suit on account of proper parties not having been made. This motion remained undecided for some time, and in the interim the executors of Hawkes Fearing filed a petition of intervention in which they sided with the plaintiffs and claimed a portion of the profits alleged to have been made by the operations of the firm, constituted as stated in the original petition. The proceedings of the cause being in this state, the court below finally rendered judgment by which the suit was dismissed for want of proper parties, from which the plaintiffs appealed.

We are of opinion that this judgment is correct.

It is now a principle settled by several decisions of this court, that in suits for the liquidation and settlement of partnership transactions and accounts, all the partners of a firm must be parties either as plaintiffs or defendants. See *10 Martin*, 435 and *3d N. S.* 476.

The argument of one of the counsel for the plaintiffs seems to admit that the heirs of Hawkes Fearing (their ancestor being a partner of the concern, the liquidation of whose accounts is sought in the present action,) were not regularly before the Court of Probates at the time of the trial of the cause; but contends that this defect in the proceedings ought to have been suggested by the defendants in an exception pleaded in *limine litis*, and that they could not legally take advantage of it by a motion to dismiss the suit after an answer to the merits.

The rules established in relation to dilatory and declinatory exceptions by the Code of Practice are not applicable to a case like the present.

All the partners according to the petition were parties to the suit; such as might be supposed to have an interest contrary to that of the succession of Ball, the testator, and who did not appear in the capacity of plaintiffs were prayed to be made defendants. The executors of Ball could not have foreseen whether their co-defendants would

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In a suit for the liquidation and settlement of partnership transactions and accounts, all the partners of a firm must be made parties, either as plaintiffs or defendants.

And where all the partners of several firms are prayed to be made parties to a suit for a liquidation and payment of the partnership concerns, and some of them reside out of the state and no representative is appointed, those who do appear may dismiss the suit for want of all the parties before the court.

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It is the duty of the plaintiff to bring all the defendants before the court, by provoking the appointment of a curator *ad hoc* to those who reside out of the state.

A petition of intervention in a suit will not be admitted after the trial of the cause has commenced.

Executors residing in another state, or representing a testator whose will was opened there, cannot intervene in a suit pending in this state until they cause the will to be made executory here.

or would not appear and become parties to the action. The situation of the cause as presented to them by the petition did not authorise the exception which the plaintiffs now insist should have been pleaded before answering to the merits. It was the duty of the plaintiffs to have brought the defendants who resided out of the jurisdiction of the court, before it by provoking an appointment of a curator *ad hoc*. This was not done and no person appeared for them to answer until the trial of the cause was nearly if not wholly finished; and then an answer was filed by which they disclaimed any interest: one of them having been previously made a principal witness for the plaintiffs. A proceeding of this kind was well calculated to surprise the real defendants, and was clearly contrary to all sound rules of practice in the administration of justice, by allowing additional pleas, and such as tended to change the condition of the parties to the suit, not only after issue joined, but after the trial of the cause was nearly completed.

The attempt of the executors of H. Fearing to intervene was wholly irregular. In addition to the objection to admit the answer at so late a period of the proceedings, a further objection to allow the petition of intervention, is fairly available for the appellees, viz: that the intervenors had taken no legal steps to authorise them, solely to prosecute suits in our tribunals by causing the will of the testator to be made executory in this state: executors act *en autre droit*; and derive their authority from the will, and the formalities required by law in relation to probate in different states and governments; notwithstanding the art. 1589 of the *La. Code* which gives validity to wills made in the other states of the union or in foreign countries. We determined in the case of *Dangerfield's executrix vs. Thurstons heirs*, that an executor deriving authority from a Court of Probates in an other state, cannot assume the character of executor here without having first presented the testament to a Court of Probates in this state. See 8 N. S. 232.

It is therefore ordered, &c. that the judgment of the Court of Probates be affirmed with costs.

TOLEDANO vs. KLINGENDER.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

To Justify payment to a broker, the purchaser is bound to show either a general custom or a special authority from the vendor to receive payment.

In the absence of proof of any authority in a broker to receive payment for the seller, or of any act from which such authority can be presumed, the buyer who pays must sustain the loss, in case the broker fails to pay over the money.

On the 2d January 1834, Toledano sold to F. Klingender fifty bales of cotton, weighing 23363 pounds, at ten and a half cents per pound, amounting to two thousand four hundred and fifty three dollars and eleven cents, on which one thousand five hundred dollars was paid, and the balance of nine hundred and fifty three dollars and eleven cents which the purchaser had advanced to one Rareshide, a broker who purchased the cotton, the latter failed to pay it over and absconded. The plaintiff, Toledano, called on the defendant, Klingender, for the balance of the price of his cotton who refused to pay it, stating it had been paid to the broker on plaintiff's account, and he must look to the broker for it.

The defendant in his answer denies being indebted to the plaintiff; admits the purchase of the cotton, but says it was done through his agent, H. C. Gildemeester, by one John Rareshide who acted in said sale as the agent and broker of the plaintiff, and was authorised by him to make said sale and receive the price thereof; and that he has paid the entire price of said cotton through his agent to Rareshide, who has paid the whole or a part thereof to the plaintiff.

The broker on making the purchase of this cotton gave the following order to the keepers of the cotton press where it was stored:

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"Fifty bales of cotton bought of C. Toledano, for account of F. Klingender, marked, &c."

"New-Orleans, 26th January 1834."

"John Rareshide."

According to the testimony of the cotton brokers this was the usual order-given on account of the buyer to transfer the cotton to his name on the books of the cotton press.

The testimony showed that the broker called on Toledano and offered to purchase his cotton, and in the course of his negotiation disclosed the name of the defendant for whom he purchased.

Gottschalk, clerk of defendant's agent, and witness for him, states that the plaintiff called on the agent of defendant for the balance of the price of the cotton, and admitted he had authorised Rareshide to sell it.

John Linton, merchant, testified that it was his custom to settle with the principal and not with the broker.

Rhodes, is a merchant, and sells cotton consigned to him, and he has with one or two exceptions, always settled with the purchaser and not through the broker who makes the sales.

E. Forstall, witness for defendant, is a cotton broker; says it is the practice of some purchasers to pay the proceeds to the broker, but some houses only pay the brokerage to the broker, and settle with the factor or seller, and that he receives more that way than any other broker, as he frequently advances his own money before the cotton is weighed. Some factors occasionally sell for less, say a quarter of a cent, to get money before three o'clock.

They send to the buyer and get money before the cotton is weighed; the money in these cases is generally paid to the broker. He says there are fifty or sixty brokers in New-Orleans; the practice of paying depends on the personal character of the broker. Many brokers never receive any money, many receive the checks to order, or not all; and some of the largest brokers act in this way.

The district judge considered that Gildemeester the agent of the defendant, who advanced the money to the broker

in a free check, placed an unnecessary and improper confidence in him, and that the loss must fall on the defendant. Judgment was rendered for the amount claimed. The defendant appealed.

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Eustis, for the plaintiff.

1. Urged that the broker had no authority to receive the money from defendant on account of the plaintiff.

2. By entrusting the broker with the money which he was not authorised to receive, the broker became the agent of the defendant, and the plaintiff is not liable for his acts.

3. The broker, Raréshide, was not employed by the plaintiff, but by the defendant, who is alone responsible for his acts.

Conrad, contra:

BULLARD, J., delivered the opinion of the court.

This case presents the single question, whether the payment of the price of a lot of cotton to a broker, who effected the sale and purchase of it, be a good payment and binding on the plaintiff as vendor.

According to the *Louisiana Code* "the broker or intermediary is he who is employed to *negociate* a matter between two parties and who for that reason is considered as the mandatory of both," *art.* 2985. It is only in facilitating the transaction of business in relation to the sale and purchase of produce, that the broker is considered as the common agent of the parties: the channel of communication between them. For any other purpose he is not regarded by law as the agent of either party. To justify a payment therefore made to a broker, a purchaser is bound to show, either a general custom, or a special authority from the vendor to receive payment.

To justify payment to a broker, the purchaser is bound to show either a general custom or a special authority from the vendor to receive payment.

The evidence in the record certainly does not establish a custom, and the weight of evidence is the other way. Many

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extensive dealers state that their practice is not to pay the broker; and when they do so, it is in consequence of their confidence in him personally. E. Forstall a broker states in his testimony that it is the practice of some purchasers to pay the proceeds to the broker or intermediary, but some houses only pay the brokerage to the broker and settle with the factor. Witness receives more in that way than any other, as he frequently advances his own money before the cotton is weighed. *The factor sometimes sells for less, say a quarter of a cent, to get money before three o'clock.* The money in such cases is generally paid to the broker.

But it is contended that Raréshide was not merely a broker but that he was authorised by the plaintiff to sell, and consequently to receive payment of the price. We have no doubt he represented himself to each party as the broker of the other, and his subsequent conduct justifies the belief, that he was capable of deceiving both. It is clearly established that this transaction was the first and only one in which he had ever acted for the parties. He was therefore personally a stranger to both. But what is the evidence that Toledano authorised him to act in any other way than as a broker? that he constituted Raréshide his agent in any other sense of the word. A clerk of the defendant's agent testifies that when Toledano called on Mr. Gildemeester for the balance of the price of the cotton, he did not dispute having authorised Raréshide to act as his broker in the sale of the cotton, on the contrary he admitted he had authorised him to sell it. Mr. Gildemeester does not go quite as far in his testimony. But even the statement of Gottschalk does not state that Toledano regarded the broker as any thing more than a broker. Laying out of view the subsequent declarations of Raréshide, which we do not consider legal evidence or as forming a part of the *res gesta* his acts so far as they are evidenced by writing would exhibit him rather as purchasing for the defendant than as selling for plaintiff. The order on which the cotton was delivered at the press is as follows: "fifty bales of cotton bought of C. Toledano for account of F. Klingender, &c." In making out the invoice he charged the defendant with

brokerage. In a case balanced as this is, if it were shown that the defendant was induced to pay the broker by any act of the plaintiff, we should think the loss ought to fall on him. But in the absence of proof of any authority in the broker to receive payment, or of any act from which such authority might be presumed, we are of opinion that the defendant acted without due caution, and equity requires that he should sustain the loss.

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MARIGNY
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In the absence of proof of any authority in a broker to receive payment for the seller, or of any act from which such authority can be presumed, the buyer who pays must sustain the loss, in case the broker fails to pay over the money.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

MARIGNY vs. PERRET ET AL.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

When the Supreme Court are not satisfied with the verdict of the jury, and judgment thereon, after an examination of the evidence, the cause will be remanded for a new trial.

Where one of several defendants made no answer and no judgment by default taken against him, although there was a general verdict and judgment for the defendants, he will not be considered as before the court, and the judgment as to him will not be disturbed, in remanding the case for a new trial.

This is an action by Marie Céleste Marigny, separated in bed and board from her husband, Livaudais, residing in France, against Perret & Charbonnet, merchants, and C. Papet, broker, late her agents, to sell and dispose of her sugar plantation and slaves, and all her property in Louisiana, which she charges they have done, and have failed to account and pay over a large balance, viz: the sum of twenty

EASTERN DIS. thousand dollars: she prays that said defendants be com-
June, 1834. pelled to render a faithful account of their agency, and pay
MARIGNY over the sum that may be found due which she alleges to be
VS. twenty thousand dollars.
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Perret as surviving partner and liquidator of the late commercial firm of Perret & Charbonnet, answered separately for said firm; he denies ever refusing to render an account, but on the contrary he annexes to his answer an account current of the agency of said firm, in transacting the plaintiff's business which he avers, was rendered and transmitted to her in person in the spring of 1832, which she received; he avers that said account was submitted to the new agent of the plaintiff who only objected to it on the ground that it was not signed by Papet, who was included in the procuration to said firm, and because a commission was charged; that Papet (who is the son-in-law of the plaintiff) did not refuse to sign said account at the time it was rendered, but his signature was omitted through a casualty, and it is only since the new agent has arrived, who resides with him, that he refuses to sign; he avers that errors excepted the said account contains a true and faithful statement of the accounts of the mandate to his firm, and Papet jointly; he prays that the account thus annexed be declared correct, that the commissions charged therein be allowed, and that the suit be dismissed with costs.

Papet did not answer, and no judgment by default was taken against him. The cause on these pleadings, was submitted to a special jury who after hearing the evidence produced on the trial, returned a general verdict for the defendants.

The district judge being satisfied with the verdict, on motion of the counsel for the defendants, rendered judgment in conformity therewith, from which the plaintiff appealed.

This cause was argued by Mr. Hennen, for the plaintiff, and by Mr. Mazureau, for the defendants, Perret & Charbonnet.

BULLARD, J., delivered the opinion of the court.

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In this case we are not altogether satisfied with the verdict of the jury, and the judgment of the court below. After an attentive examination of the evidence, we are of opinion that justice requires the case should be remanded for another trial by jury. C. Papet was made defendant, but no answer appears to have been filed by him, nor was there judgment by default. It is left doubtful what amount of commissions the jury intended to allow to the defendants and appellees, as the account is rendered in the name of their agents, and the verdict is a general one. But as the defendant Papet is not before the court, the judgment as to him cannot be disturbed.

Where the Supreme Court are not satisfied with the verdict of the jury and judgment thereon after an examination of the evidence, the cause will be remanded for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, as relates to the defendants Perret & Charbonnet, be annulled and reversed, that the case be remanded for a new trial, and that the appellees pay the costs of the appeal.

Where one of several defendants made no answer and no judgment by default was taken against him, although there was a general verdict and judgment for the defendants, he will not be considered as before the court, and the judgment as to him will not be disturbed, in remanding the case for a new trial.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Where a third person stipulates with a commercial firm, to advance a certain sum in cash or by endorsement for its support and credit, on which he is to be allowed ten per cent. interest per annum, and one third of the profits for a term of years, at the end of which this sum is to be re-imbursed, he will not be considered as a partner, but as having made a loan to the firm.

When it is stipulated between plaintiff and defendant, that the latter is to receive ten per cent. per annum interest on his advances to, and one third

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of the profits in the mercantile firm of the former, the contract will be declared usurious, and no part of the interest and profits can be recovered.

The approval of accounts rendered in the course of business, does not prevent the party from showing there are errors in them on a final settlement.

William Flower, a member of the firm of W. & D. Flower alleges that said firm becoming embarrassed in business, about the 19th June, 1822, entered into a written agreement with the defendant, by which the latter was to advance said firm the sum of twenty thousand dollars, with interest at ten per cent. per annum, to pay off their old engagements, which sum was to be paid in cash or in endorsements of the said W. & D. Flower's notes of accommodation, and re-imbursable at the end of three years.

A further agreement was entered into between the plaintiffs Wm. Flower, David Flower and David Griffith, all residing in New-Orleans, to take effect the 1st July, 1822, by which the two latter were to carry on the commission business and the former was to retire to West Feliciana, and from thence to aid and enlarge the business of their establishment in New-Orleans, all in his power; and that there should be allowed to Laurent Millaudon, as a compensation and in consideration of an advance of twenty thousand dollars, lent by him for the liquidation of the concern of W. & D. Flower, and for the help of the new one, *one third* of the net profits, one thousand dollars of which to be paid the first of July, each year, and the remainder passed to his credit. &c., as capital stock, bearing six per cent. interest until the close of the three years. The account opened in the new books under the denomination of "old books," to be balanced every 1st of July; and copy of this agreement to be furnished to Millaudon, &c. The plaintiff alleges that he continued his aid to said firm with funds and his credit, after his retirement to the country from time to time, until its expiration in July, 1825; that in the meantime there were various transactions between him and the defendant to considerable extent; and that it was not until March, 1827, that he could

get an account rendered by the defendant, to ascertain how his affairs stood; and that the account rendered at that time of the transactions between him and the firm of W. & D. Flower were defective, and omitted the transactions between that concern, and the said Millaudon for the two first years, which has not yet been furnished.

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That in the account rendered there was a much larger balance against him, than he anticipated; and supposing the account to be made good in faith, and also correct, he broke up his establishment in Feliciana, and brought twenty-six slaves, which had previously been mortgaged to defendant, to the city, for the purpose of being sold to pay off said balance. That he left them with his brother D. Flower and Millaudon, and returned to the country; and soon after his brother sold them to defendant for eleven thousand and six hundred dollars as a cash price, with which he was to be credited, but no act of sale was passed. That at the instance of the defendant, and to avoid a judicial mortgage against the firm of W. & D. Flower, when he returned, he was induced to let Millaudon have said slaves in satisfaction of his mortgage, which was prior to the judicial mortgage, and to make conveyances to such persons as would purchase them of him; that it was expressly understood that Millaudon was to take said slaves subject to all incumbrances, for the price of eleven thousand and six hundred dollars, as so much in satisfaction of his mortgage; but that he refused to take a conveyance from the plaintiff, in pursuance of said agreement, but insisted and persisted in having said slaves sold by the sheriff, under an order of seizure obtained on his mortgage, and bought them in at reduced prices; by which he (plaintiff) has sustained a clear loss and damage of five thousand dollars; that said defendant has been guilty of great fraud, in keeping and rendering his accounts to the said firm, which has been recently found out, &c. He further charges that by false representations of the state of the accounts between said defendant and the firm of W. & D. Flower, he was induced to believe Millaudon had advanced the full sum of twenty thousand dollars to said firm as stipu-

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lated, and accordingly in March, 1827, mortgaged all his property in Feliciana (the aforesaid negroes included) to the amount of forty thousand dollars, to secure the payment of any amount that might be owing by said firm; but he avers that any debt that was owing said firm, has since been paid off; and that on a fair and equitable settlement of accounts between said defendant and the *new firm*, and the said firm of W. & D. Flower, and those between the plaintiff and the defendant, that the latter will stand indebted to him (who is proprietor of all the rights and interests of the old firm by assignment) in the sum of twelve thousand dollars. He prays that Millaudon be required to render a detailed account of all his transactions with said firms, and that he have judgment against him for twelve thousand dollars, or so much as shall be found due; and that the mortgage given by the plaintiff on his slaves and all his property to secure the balance which Millaudon fraudulently and falsely represented to be due to him, be cancelled; and in order to effect a final settlement of all the accounts of the old and new firms of W. & D. Flower, that D. Flower and D. Griffith, as well as L. Millaudon, be cited to appear; and he charges that D. Flower and D. Griffith, on a fair settlement, are indebted to him in the sum of five thousand dollars, on account of the old and new concern of W. & D. Flower, for which he also prays judgment.

Millaudon pleaded a general denial; admitted he had had pecuniary transactions with the plaintiff of the character alluded to, but that upon a fair settlement of the accounts arising from those transactions, there was a balance due him according to four accounts current and a mortgage annexed, of twenty-seven thousand eight hundred and seven dollars and eighty-four cents, for which he prayed judgment in reconvention.

D. Flower and D. Griffith, who were impleaded with the defendant, put in separate answers containing a general denial, &c.

The testimony taken and read on the trial, was principally directed to the state of the accounts between the par-

ties, and to the manner and conduct of the defendant, in relation to the mortgage and sale of the plaintiff's slaves. EASTERN DIS.
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It appeared among the transactions, that Millaudon had loaned or given a note on V. Nolte & Co., for ten thousand dollars, having two years to run, for which he charged the plaintiff eleven thousand and two hundred dollars. The excess of interest thus charged was objected to as illegal and usurious.

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A bill of exception was taken to the admission of D. Griffith, as a witness for the plaintiff on the ground that he was a partner of the firm of W. & D. Flower; but he was admitted by the court as competent to prove that the defendant Millaudon had received funds of the *old firm*, provided the transaction be not connected with the new one, &c.

The defendant's counsel objected to the commercial books of W. & D. Flower, from July 1st, 1822, to July, 1825, being admitted in evidence, because they were the books of W. & D. Flower, and there was no evidence on record to establish any partnership between him and the said W. & D. Flower, and that consequently they were not evidence against him, they being the books of the plaintiff, and his co-partners, who are all interested in the event of the suit; the court sustained the objection, and the plaintiff excepted.

The cause was tried by a special jury of merchants, who returned a verdict for the defendant Millaudon, for the amount of his claim in reconvention, and a general verdict for the defendants D. Flower and D. Griffith.

The plaintiff moved for a new trial on the following grounds:

1. The court erred in taking the question of partnership from the jury, by refusing to admit the books of W. & D. Flower, thereby prejudging the verdict of the jury on that point.

2. The verdict is contrary to law and evidence, either in not finding a partnership, or in not striking off all the interest and profits, the contract being usurious.

3. On the loan transaction, plaintiff proved sufficient to put Millaudon on proof of consideration of the note of

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eleven thousand dollars, not having done so the consideration should be presumed usurious, and the interest stricken out.

4. All the interest should have been stricken out of the account.

5. The exclusion of the books of W. & D. Flower, prevented any evidence against D. Flower and D. Griffith; and as to them a judgment of non-suit should have been entered.

The district judge overruled the motion for a new trial and gave judgment confirming the verdict. The plaintiff appealed.

Hennen and Worthington, for the plaintiff, contended that the District Court erred in refusing a new trial on the grounds, and for the reasons stated in the application.

2. Partnership or no partnership, is a question for a jury, and there was sufficient evidence of partnership offered to entitle plaintiff to have that point decided by the jury. The court by excluding the books of the new concern, prejudged the question of partnership, and precluded the jury from deciding on that question.

3. Under the agreements No. 1 and 2, and the accepting of one third of the profits, L. Millaudon, David Flower, and David Griffith, were the partners of the new concern of W. & D. Flower, from 1st of July, 1822, to 1st of July, 1825.

4. L. Millaudon, as partner of the new concern of W. & D. Flower, is bound to plaintiff in his own right as partner of the old concern, and as assignee of D. Flower's interest therein for the amount of debt due by the new concern to the old concern, and the books of the new concern are proof of the extent of that debt.

5. Said Millaudon is in like manner liable to plaintiff for any debts paid by him as nominal partner in the new concern.

6. The plaintiff having in his petition impeached the consideration of the eleven thousand dollar note, and imputed usury, and alleged that the only consideration given

for it was the Nolte note of ten thousand dollars; and L. MILLAUDON'S books corresponding therewith in not showing any other consideration, Millaudon was bound to show other or further consideration of said note, not having done so, plaintiff's note for eleven thousand dollars, and all the interest thereon should be struck out of the account, and be replaced by the true consideration, viz: ten thousand dollars without interest.

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7. Or if not a partnership, the original contract was a usurious loan, and interests and profits must be struck out of the accounts and claims of the defendant.

Skidell, for the defendant.

1. The agreement between W. & D. Flower and L. Millaudon does not as between themselves create a partnership, although it may constitute them partners and make them responsible as such in relation to third parties. The allowance of one third of the profits considered as the price paid to Millaudon for the use of his name and credit, made him responsible to the full extent of his property for the engagements of the house of W. & D. Flower, and as he was to be allowed no commission for his endorsements, he might under that agreement have well received no other compensation. 4 *La. Rep.* 139.

2. Millaudon not being a party to the agreement between W. & D. Flower, and Griffith, cannot be bound by it; there is no evidence to connect it with him, except the fact of his being furnished with a copy and having corrected the draft of it; this he might well do, because as he had made himself by his original agreement responsible for all the engagements of the house, he had a positive and direct interest in knowing the terms upon which the business was to be conducted.

3. William Flower was a partner of the new concern. This is declared by the act of partnership itself. He cannot repudiate his own written stipulation to that effect. The circumstance that he was not to receive a

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share of the profits of the new concern does not change his character. He received a full equivalent in another form, the winding up and liquidation of the old concern, the collection of its debts without contributing in any way to the expense of the same, on all sums so collected he was to be allowed an interest of ten per cent. to be paid him annually, the principal to form a portion of the capital of the concern. It is not of the essence of partnership that the advantages of one partner should be a division of profits in the form of money; they may exist in any other form, and may be regulated in any way the partners may stipulate. C. C. 2782, 2783. *Old Code p. 388, art. 1, 2, 4.*

4. The court did not err in refusing to permit the books of W. & D. Flower to go to the jury until sufficient evidence had been produced to show partnership; no evidence had been given to establish the existence of a partnership. Even if the partnership had been proved, the books could not have been admitted as evidence against Millaudon.

5. The contract to receive ten per cent. interest on monies advanced, and one third of the profits was not usurious. The credit of Millaudon and use of his name as endorser was a sufficient consideration for the stipulation of a share in the profits, although not liable for losses to the partners of the house, he was liable to third persons for the debts of the firm to the whole extent of his fortune. *Cur. Philip, 6 cap: Intereses, p. 359, No. 50.*

6. If there was any thing usurious in the original contract it has been purged by the repeated settlement of accounts made by Flower, with a full knowledge of all the circumstance of the case. 4 *La. Rep.* 542, 2 *La. Rep.* 430.

7. The finding of the jury where no bill of exception is taken to the charge of the judge will be sustained by the court, unless manifestly illegal. It should be the more decisive in this case, as by consent of parties it was referred to a special jury composed of the most intelligent merchants of New-Orleans, who rendered the verdict after a protracted and laborious investigation which occupied several days.

BULLARD, J., delivered the opinion of the court.

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This case involves the examination of complicated transactions between the parties for a series of years, some of which relate to the late firm of W. & D. Flower, under a special contract with the defendant, and some to the plaintiff personally. The court is called on in the first place to give a construction to the contract under which the defendant made certain advances to the late firm. It is contended by the plaintiff's counsel, first, that Millaudon made himself a partner of the house of W. & D. Flower, by stipulating for a portion of the profits of the concern, not only in relation to third persons dealing with the house on his credit, but also in relation to the plaintiff, who was in part but a nominal partner, and that consequently the defendant is liable to him for losses sustained by him as a partner in the old firm and a customer of the new, under the head of *old books*. But if the court should be of opinion that he did not make himself a partner by that contract to the extent contended for, then it is urged, secondly, that the contract was usurious, in as much as Millaudon stipulated for something more than ten per cent interest for advances made to the concern, and that he is bound to deduct from his account the profits he has received and the whole interest charged.

I. As to the partnership:

An agreement dated June 19th 1822, was entered into between W. & D. Flower on the one part, and Laurent Millaudon on the other, by which the latter engaged to furnish that house an advance of twenty thousand dollars, either cash or endorsements in order to enable them to pay off their old engagements. This advance was to be continued for three years. They engaged on their part to pay an interest at ten per cent on the money-advance, and one third of the profits of a new concern under the same style which was to take place on the 1st of July following, and to continue for the space of three years. To secure the

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reimbursement of this advance they engaged to give their obligation secured by H. Flower, James Flower, J. L. Finlay and J. C. Faulkner. Articles of partnership for the new concern alluded to in this contract were entered into on the same day between W. & D. Flower and David Griffith. This latter contract is not signed by Millaudon, and it is not necessary for our present purpose to recite its particular stipulations. One article is in the following words: "a copy of this agreement signed by the parties will be furnished to L. Millaudon, and they also agree to let him have the same freedom for the investigation of the books as one of the parties."

It appears to us the parties never contemplated that Millaudon was to be viewed in the light of a partner of this house, to the extent contended for by the Plaintiff's counsel. He was to receive a certain share of profits for the risk run by him in sustaining the credit of the house by his endorsements. This participation in profits might render him liable towards third persons dealing with the firm, but it would in our opinion, be wholly inconsistent with the general tenor of the agreement, to consider him liable towards the partners themselves for any losses which would diminish the capital advanced by him. The advance made by Millaudon under this agreement was in truth a loan, and the plaintiff bound himself for its ultimate reimbursement. It is true the plaintiff was no longer to come in for profits *eo nomine*. And although he was to reside in the country when he engaged to advance the general interest of the house, the only benefit he calculated to derive from its operations was the recovery of capital due him by the former house of W. & D. Flower, with which an account was to be opened under the name of "old books." The annual balance in favor of old books was to bear an interest of ten per cent, which interest was to be paid to W. Flower, on the 1st of July of each year, and the capital to remain in the new concern. We are bound under this contract to regard the plaintiff as a partner in the new house and not a stranger, having a right to look to

Where a third person stipulates with a commercial firm to advance a certain sum in cash or by endorsements for its support and credit, on which he is to be allowed ten per cent. interest per annum and one third of the profits for a term of years, at the end of which this sum is to be reimbursed, he will not be considered as a partner, but as having made a loan to the firm.

Millaudon to make good to him any losses he may have sustained. EASTERN DIS.
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II. As to usury:

It has been settled by various decisions of this court that whensoever a higher rate of interest than ten per cent has been agreed upon, either directly or indirectly, under whatever disguise or pretence it may be, no part of the stipulated interest can be recovered. 3 N. S. 191, 622. 4 N. S. 167, 201. 7 N. S. 408. 4 La. Rep. 542. 3 La. Rep. 387.

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In order to ascertain whether this contract be usurious or not it is necessary to analyse it somewhat minutely. Millaudon engages to furnish the house of W. & D. Flower an advance of twenty thousand dollars, to be made either in endorsements of their notes of accommodation in the banks of New-Orleans or in cash as they may require, to be continued for the space of three years from the 1st of July 1822. On the curtailment of the notes of accommodation he engages to extend his advances to such amount as he should be relieved from the endorsements; so that the money advanced and the endorsements should always remain at twenty thousand dollars. W. & D. Flower on their part bind themselves to pay him an interest at the rate of ten per cent per annum on any or all sums of money so received by them until refunded; the interest to be settled up annually on the 1st of July. The last clause of the contract we give in the words used by the parties, to wit: "and in consideration of the sum so furnished, or to be furnished by the said L. Millaudon to the said W. & D. Flower, to wit, by the endorsements of their notes of accommodation as aforesaid, and by the advances of money as before mentioned, the whole amounting to twenty thousand dollars, the said W. & D. Flower will give to L. Millaudon their obligation secured by H. Flower, J. Flower, J. L. Finlay and J. C. Farnham, and also one-third part of the profits of the new establishment under the firm of W. & D. Flower which is to take place on the 1st day of July next, and to continue until the 1st day of July 1825." According to the literal tenor of this last clause of the con-

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tract, one-third of the profits are to be given in consideration of the endorsements and the advance of money. It cannot be said therefore without disregarding the very words of this clause, and the only grammatical construction of which it is susceptible, that the profits were exclusively intended to cover the risk incurred by the endorsements, and that a previous part of the instrument provides for the payment of interest at ten per cent on the money part of the advances to be made. If the whole had been in money, the contract would have secured to the lender two thousand dollars as interest, and one-third of the profits besides. We cannot suppose that the loan and money would have been made for an interest of ten per cent, unless coupled with the further engagement to pay a part of the profits. The two are so blended together in this contract that we cannot separate them. But it is argued that it was optional with W. & D. Flower to take money or not; that they might have accepted of endorsements alone and then no interest would be due. This argument assumes as a principle, that if a party voluntarily engages to pay usurious interest, he is not entitled to relief. But the law annuls stipulations for the payment of usurious interest, not because they are not voluntary, but because the policy of the law prohibits them; and they are null because prohibited and not because there was any want of consent. But suppose the leaving of it to the option of the borrower amounts to nothing more than a proposition; as soon as that proposition is accepted by the borrower's signifying his option, the contract is formed. Now in point of fact the first advance made was partly in money and partly in endorsements and both interest and profits were charged for the first year. We cannot yield our assent to the reasoning which would make the same contract at one time usurious and not so at another according to the varying state of accounts between the parties.

Where it is stipulated between plaintiff and defendant that the latter is to receive ten per cent, per annum interest on his advances to

We are of opinion that the stipulation for interest and profits in this contract was usurious, and that consequently so much of the amount claimed by defendant in reconvention as is made up of profits and interest on those advances ought

to be deducted. But we cannot without the hazard of great injustice to the parties in the present state of the accounts, proceed to establish a balance. We think the court below ought to have submitted the accounts to auditors to state an account.

III. Among the transactions between the plaintiff personally and the defendant, there is one of which the former complains. He alleges that he received from the defendant a note of Nott & Co. for ten thousand dollars, having about two years to run, and that the defendant exacted from him usuriously his note for eleven thousand dollars payable at the same time. And he claims credit for the eleven thousand dollars as well as accruing interest. We find this item of eleven thousand dollars charged in account A, and by adding interest upon interest at the rate of ten per cent, it amounted at the time of the trial to nineteen thousand nine hundred and thirty dollars and six cents. This compound interest is not justified by any evidence in the record. Whether the difference between the amount of Flower's note and Nott's ought also to be struck out together with all accruing interest depends on the question, whether the transaction was usurious. Two facts are clearly established, to wit, that there was an exchange of notes, and that there was a difference of a thousand dollars between them. But it is left doubtful whether both notes had the same time to run; if Flower's note had a year longer to run than Nott's, then the difference is accounted for. The evidence shows that Millaudon had two notes of V. Nott & Co. for ten thousand dollars each; his journal shows that on the 22d June 1822, he charged himself with one of these notes, "No. 66, given to W. & D. Flower." On the same day the note of W. Flower was given for eleven thousand dollars payable about two years after. If we were bound to pronounce finally on this part of the case as it now appears in evidence, we should be inclined to think that the presumption is against the interest. But as the cause must be remanded the parties will have an opportunity to give further evidence on this item. It is in the power of the defendant to explain it.

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and one third profits in the mercantile firm of the former, the contract will be declared usurious and no part of the interest and profits can be recovered.

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There is another transaction of which the plaintiff complains. He alleges that two notes passed to the defendant for two thousand and seven dollars and seventy-five cents each, were credited only for the amount of two thousand five hundred and forty-nine dollars and fifty-four cents, the balance being retained as usurious interest. It does not appear in evidence what time those notes had to run. It appears from the record, there were several by the same drawers falling due at different periods, and that from two of them a large deduction was made for discount, but whether the plaintiff be entitled to a deduction for excessive discount we are unable to pronounce in the present state of the case.

A bill of exceptions was taken to the refusal of the court to allow the commercial books of the firm of W. & D. Flower to go to the jury, after having first exhibited the contracts Nos. 1 and 2 and introduced other evidence. At first we were inclined to the opinion, that the books ought to have gone to the jury under these circumstances in support of the allegation that the defendant was a partner. But subsequent reflection has satisfied us that our first impression was incorrect and we concur with the court below that the books were inadmissible. It has been urged that the question was left to the jury, whether there was a partnership or not, and that by withholding the books, the court took this issue from the jury. The books do not purport to be those of a commercial firm, of which Millaudon was a professed partner and to have admitted them would have assumed that Millaudon was a partner of the firm of W. & D. Flower as between the partners themselves. But the fact is, the books were not offered to prove the partnership, but to show the profits or losses of a firm of which it was contended Millaudon was virtually a partner. The articles of partnership were not signed by Millaudon, and we have already expressed our opinion that he was not a partner in relation to the plaintiff; and that such does not appear to have been the original intention of the parties.

There seems never to have been a final settlement of accounts between the parties, and the defendant in his answer

avers that on such settlement the plaintiff will be largely his debtor, and he claims that balance in reconvention; the approval of accounts rendered does not in our opinion preclude the plaintiff from showing errors in the accounts. But we are unable as the case now appears before us to strike a final balance. Justice in our opinion requires that the case should be remanded for a new trial, according to the principles herein laid down.

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The approval of accounts rendered in the course of business, does not prevent the party from shewing there are errors in them on a final settlement.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be reversed, and that the case be remanded for a new trial, and that the appellee pay the costs of this appeal.

KIMBALL AND LILLY vs. BRANDER ET ALS.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

The bill of lading is only *prima facie* evidence that the goods and merchandise mentioned in it were shipped in good order.

Other evidence will be received to show that the articles mentioned in a bill of lading as being shipped in good order, were damaged before shipment.

This is an action for the recovery of the freight on two hundred and ninety-eight bales of cotton and six packs of peltry, shipped on board the plaintiff's steamboat Saratoga, at Ecure à Fabre, and delivered to the defendants as consignees in New-Orleans. The sum claimed is four hundred and fifty dollars.

The defendants pleaded the general issue; and that the cotton and peltry which was shipped in good order, was damaged by the negligent conduct of the plaintiffs to the amount of four hundred and forty-seven dollars and fifty-four cents

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according to an account annexed, which they plead in compensation and reconvention.

On the trial of the cause the plaintiffs offered several witnesses to prove that the cotton was damaged before it was received for shipment on board the steamboat; the defendant's counsel objected to the testimony on the ground that it went to contradict the bill of lading, which they produced to show that the cotton was shipped in good order; the court admitted the evidence, considering the bill of lading as only *prima facie* evidence of the highest order.

After hearing the testimony of the parties, the jury returned a verdict for the plaintiff for the whole amount of his claim. The defendant appealed.

Keene, for the plaintiff.

1. The bill of lading relied on by the appellants constitutes only *prima facie* evidence in their favor.

2. The numerous and strong facts irrefragably established in the record in favor of the appellees, in respect of the greatly damaged state of the cotton in question, show unequivocally that the damage complained of by the appellants, was produced or occasioned by causes altogether extraneous of any occurrence on board of the steamboat Saratoga, and causes that did not involve the responsibility of the appellees.

McCaleb and Gray, contra:

BULLARD, J., delivered the opinion of the court.

This suit is instituted by the owners of the steamboat Saratoga, to recover of the defendant freight on a lot of cotton and peltry from the *Ecore à Fabre* to New-Orleans. The defendants in their answer allege that the cotton when delivered was damaged, and they claim in reconvention the damages sustained by the deterioration of the cotton.

The bill of lading is in the usual form, stating that the cotton and other articles were shipped in good order and well-conditioned. A bill of exceptions was taken by the defendants to the admission of evidence on the part of the plaintiffs,

to show that the damage to the cotton had been received before it was shipped, and was occasioned by being left a long time on the ground, and exposed to the weather on the Ouachita river. Such evidence was objected to on the ground, that it went to contradict the bill of lading. We are of opinion the evidence was properly admitted. A bill of lading is not considered conclusive evidence either as to property or the real condition of the merchandise at the time of the shipment. It is *prima facie* evidence, and clear and strong evidence should be required to rebut it. *Abbot* in his Treatise on Shipping, says while treating on this instrument, "It is obvious that the quality, and frequently also the quantity of the goods must be unknown to the master; and the Commentator on the Ordinance informs us, that by the quality, the exterior and apparent quality only is meant." *Abbot on Shipping*, p. 217.

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The bill of lading is only *prima facie* evidence that the goods and merchandise mentioned in it was shipped in good order.

Other evidence will be received to show that the articles mentioned in a bill of lading on being shipped in good order, were damaged before shipment.

On the merits, the evidence which we have carefully examined, leaves no doubt on our minds, but that the cotton was damaged before it was laden on board the *Saratoga*. It was brought from the part of the country where it was raised, down the Ouachita river to the *Ecore à Fabre*, when it was left on the ground exposed to the weather. On its arrival in this city four or five days afterwards, it was found rotten to the depth of several inches. It is physically impossible that it could have become so rotten in so short a time as appears to have elapsed between the shipment and the delivery of it here.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court be affirmed with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

When it appears there was no allegation or proof of an amicable demand before the inception of the suit, the defendant may, on asking it in his answer to the appeal be allowed his costs in both courts.

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This is a personal action against the defendant to recover five thousand seven hundred and fifty dollars, the balance alleged to be due on the sale of a lot of sugar.

The plaintiff alleges she sold and delivered to the defendant in 1829, two hundred and forty-eight hogsheads of sugar, weighing three hundred and forty-two thousand two hundred and ninety pounds, at six and a half cents per pound, the then current price, amounting to twenty-two thousand two hundred and forty-eight dollars and eighty-five cents, on which she has received in cash, advances, merchandise, credits, &c., only sixteen thousand four hundred and ninety-eight dollars and seventy cents, leaving a balance of five thousand seven hundred and fifty dollars and fifteen cents, still due to to her, which the defendant *has refused* and *refuses* to pay; and for which she prays judgment. Millaudon denied that he owed any thing as alleged against him.

The evidence showed that the sugar in question was shipped to New-York by the defendant, at the instance, and on account of the plaintiff's agent A. L. Mayronne, and that the account of sales rendered was approved by him; and the account current rendered by defendant to Mayronne, plaintiff's agent, for supplies was also approved by him; these accounts show a balance in favor of plaintiff of sixteen dollars, for which judgment was rendered and for costs.

The plaintiff appealed.

The defendant in his answer to the appeal, prayed that the judgment be corrected in his behalf, by allowing him his costs, as no amicable demand was made by the plaintiff in the suit.

Soulé, for plaintiff.

Slidell, *contra*:

MARTIN, J., delivered the opinion of the court.

The petition charges that the plaintiff sold a quantity of sugar to the defendant who is indebted to her for the price. He resisted her claim on the plea of the general issue. There

was judgment for the sum of sixteen dollars, and she appealed.

The evidence shows that the sugar was shipped to New-York by the defendant at the request of A. L. Mayronne, the plaintiff's agent, to whom he communicated the account of sales, and by whom it was approved. That the defendant furnished said agent with the necessary supplies for the plantation of the plaintiff, of which said A. L. Mayronne was agent; and the amount of these supplies deducted from the net proceeds of the sale, leaves but a balance of sixteen dollars in favor of the plaintiff.

The appellee has prayed an amendment of the judgment by striking out the part which condemns him to pay costs. There is no allegation or proof of an amicable demand before the inception of the suit. The plaintiff was not therefore entitled to costs.

It is therefore ordered, adjudged and decreed, that the judgment be annulled, avoided and reversed, and that the plaintiff recover from the defendant the sum of sixteen dollars and pay costs in this court.

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AND
JOHNSON.

When it appears there was no allegation or proof of an amicable demand before the inception of the suit, the defendant may, on asking it in his answer to the appeal be allowed his costs in both courts.

McGLOIN vs. HENDERSON AND JOHNSON.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF
NEW-ORLEANS.

When passengers in a vessel are conveyed to a different port without their consent than that agreed on at the time of sailing, no recovery can be had for the amount of their passage money.

So where the owners of a schooner stipulate to deliver passengers at a particular place for a certain sum, in the penalty of one thousand dollars, and fail without the fault of the other party the penalty is thereby forfeited and will be recovered.

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The plaintiff alleges that he entered into a contract of affreightment or charter party on the 1st of October 1833, in New-York, with the defendants, owners of the schooner Messenger, for the use of the hold and cabin of said schooner, to carry passengers on a voyage from the city of New-York to the port of Aransasua, in Texas, for which he was to pay seven hundred dollars; the owners furnishing every thing necessary to the voyage; that a penal clause was inserted in said contract by which the party who violated, or failed to perform said contract forfeited to the other party one thousand dollars; that forty three passengers embarked on board said schooner in pursuance of said contract, and that the captain put in command by the owners, without any reasonable cause, and in open violation of the contract between the owners and the plaintiff brought said schooner into the port of New-Orleans, to the great damage and injury of said passengers who were emigrants to Texas, and against their will and without their consent, by reason of which the penalty of one thousand dollars is forfeited by the owners of said vessel; for which and for three hundred and fifty dollars advanced to said owners in New-York, he prays judgment; and that said schooner be seized and sold in virtue of his attachment to satisfy said judgment.

The defendants admitted the execution of the contract, but denied its breach, and avered that the voyage was interrupted by the misinformation of the plaintiff in undertaking to pilot the vessel; and by his violence, menaces and attempts to stir up mutiny among the passengers and crew; the defendants charge that the voyage was completed by putting into New-Orleans, and that the plaintiff owes three hundred and fifty dollars on his contract, and one hundred dollars for the cabin passage of four persons, for which they pray judgment in reconvention.

After hearing the testimony of a number of witnesses called by the parties, the parish judge was of opinion that the defendants had failed to deliver the passengers against their will, according to contract, and having violated its

terms was bound to pay the penalty; and that they should refund what had been advanced to them in New-York, as a *pro rata* freight could only be demanded, on the ground of a voluntary acceptance of the cargo by the shipper at an intermediate port, and a dispensation of proceeding farther.

2 *Gallison* 164, 1 *Mason* *ibid*.

Judgment for plaintiffs for one thousand three hundred and fifty dollars and costs. The defendants appealed.

Roselius for the plaintiff.

1. The principle of law contended for by the opposite party in the court below is not contested. It is admitted that damages cannot be super-added to the penalty for the non performance of a contract; that a party cannot exact the performance of the principal obligation, and at the same recover the penalty, unless the latter is given for delay.

2. We claim in this case the amount advanced as paid without consideration, and the penalty as the amount of damages sustained by us, which is fixed by the parties in the contract, and forfeited in consequence of the non-performance of the contract on the part of the defendants.

3. The evidence shows clearly that it was the fault of the captain, whom the owners put in the command of their vessel, and not that of the plaintiff, that occasioned the failure of the voyage.

Strawbridge for the defendants.

1. The plaintiff cannot recover the sum advanced by him as damages on his contract and the penalty too. *Pothier on Ob. No. 342. 6 Toullier No. 813. 1 Mar. N. S. 403.*

2. By the common law the penalty is always released on payment of the principal or real debt.

3. A close examination of the testimony will show that the failure to land at the port of destination was occasioned by the conduct of the plaintiff.

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BULLARD, J., delivered the opinion of the court.

The plaintiff sues the owners of the schooner *Messenger*, to recover back the sum of three hundred and fifty dollars paid by him on a contract of charter-party, together with one thousand dollars, the penalty stipulated in the contract in case of its non performance. The charter-party shows that the owners had let to freight the hold of the schooner for a voyage to be made from New-York, to Aransasua in Texas, then to be discharged, the dangers of the sea excepted. The charterer was authorised to load and put on board a loading of such goods and merchandise as he should think proper, contraband goods excepted. He engaged to pay seven hundred dollars for the freight or hire of the schooner, one half to be paid before sailing, and the balance on the arrival of the schooner at the place of her destination. He further engaged to pay one half of the port charges and and pilotage; and was at liberty to put four passengers in the cabin. The parties further bound themselves, mutually to pay a penalty of a thousand dollars, in case of non performance of the stipulations of the contract. It appears that one half of the hire was advanced, and the schooner sailed at the time agreed on loaded with emigrants, accompanied by the charterer, but did not enter her port of destination; on the contrary after making an attempt to enter the captain steered for, and ultimately reached the port of New-Orleans.

The defendants admit the execution of the charter-party, but deny any breach of the contract. They demand in reconvention a judgment for the balance of the hire or freight, alleging that the completion of the voyage, was prevented first, by the misinformation given McGloin, the plaintiff, who represented, that he was capable of piloting the vessel into port, and, secondly, by his menaces and violence, and attempts to stir up mutiny among the passengers and crew and to run the vessel on shore. They claim also one hundred dollars for four additional cabin

passengers beyond the number stipulated for. It is not pretended that the loss of the voyage was occasioned by perils of the sea, and the only question is, whether it was broken up by the fault of the charterer himself.

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The evidence is somewhat contradictory, but there are some facts about which there is no dispute. First: that after making an unsuccessful attempt to cross the bar of the port of Aransasua, the captain refused to make another attempt, or wait on the coast for more favorable weather, or to send out a boat to sound the channel. Secondly: that no actual attempt at violence was made. Thirdly: that the captain refused to put into some port of Texas, though urged to do so by the charterer, but persisted, notwithstanding his remonstrances, to come to New-Orleans. The captain himself admits that after the attempt to enter Aransasua, when in the latitude of Matamoros, the plaintiff proposed to go there. The distance was one hundred or a hundred and fifty miles, and they were then three hundred miles from the Mississippi. If the captain had complied with this request, it would probably have been a virtual compliance with the contract. The charterer at any rate professed his readiness to accept it as such. He cannot, therefore, say that he has been prevented from earning the freight by the fault of the charterer. No menaces are proved to have been made until after the master had declared his determination to sail for New-Orleans. The passengers had no right to interfere, and the request of a part of them to be conveyed to New-Orleans, amounts to nothing. Their contract was with the charterer and not with the captain and owners. The defendants we think have failed to show that they were prevented, from performing their contract, either by the perils of the sea, or by the fault of the plaintiff.

The claim on the part of the defendants, for one hundred dollars, for the four additional passengers in the cabin cannot be sustained. We are to presume that their passage was to be from New-York to Aransasua, and not to New-Orleans. Not having been conveyed thither, no passage money is due.

It has been contended that the plaintiff is not antitled to

When passengers in a vessel are conveyed to a different port without their consent than that agreed on at the time of sailing, no recovery can be had for the amount of their passage money.

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So where the owners of a schooner stipulate to deliver passengers at a particular place for a certain sum, in the penalty of one thousand dollars, and fail without the fault of the other party the penalty is thereby forfeited and will be recovered.

recover back the money already paid, and the defendant's counsel relies on the authority of *Abbott, on shipping, p. 277*. But the case there mentioned turned on the principle that the non-performance was owing to the neglect or default of the party claiming to be refunded. We do not think the case applicable to this.

The owners having failed to comply with their contract, have forfeited the stipulated penalty, and are bound to refund what has been already paid.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court, be affirmed with costs.

OPINION ON THE RE-HEARING OF THIS CAUSE.

A penal clause in a contract fixing the amount of damages in case of its non-performance by either party is reciprocal, and must be enforced on this principle, and nothing more or less than the penalty fixed can be recovered.

But where a penal clause in a contract fixes the amount of damages in case of non-performance by either party, and there is a part performance by one of them, the court may modify the penalty accordingly.

So where one party advances half the sum stipulated in the performance of a contract, which has a penal clause of one thousand dollars in case of failure, and the other party fails to complete his part, the former cannot recover back the sum advanced and the penalty too; he can only recover the penalty.

The plaintiff obtained a re-hearing in this case on the ground of error in the first judgment.

BULLARD, J., delivered the opinion of the court.

The court have maturely considered the question presented on the re-hearing of this case, to wit: whether the plaintiff be entitled to recover both the sum paid in advance as part of the hire of the schooner, and the penalty of one thousand dollars stipulated for damages in case of non performance of the contract.

In the absence of proof as to the law of New-York, where the contract was made, we are bound to take our own laws as the rule of decision.

The advance of one half the hire was a part of the contract. It could not therefore be recovered back *eo nomine* without a rescision of the contract. The penal clause was intended to fix the amount of damages to be recovered in case of non-execution of its stipulations, and nothing more nor less could be recovered, except that the court is authorised in cases of partial execution to modify the penalty. *La. Code Ar. 2123.*

The penal clause of this contract is reciprocal, the parties mutually bind themselves to each other in the penal sum of one thousand dollars. Suppose the plaintiff had violated the contract on his part by refusing to pay the three hundred and fifty dollars in advance, would the owners have been entitled to recover that sum and the penalty besides? Surely not: because that would have been to enforce performance of the contract and to recover the penalty at the same time. We cannot suppose any case in which the defendant would be entitled to recover more than a thousand dollars. If on arrival at the port of destination the plaintiff had refused to pay the remaining part of the hire, and the owners had sued on the penal clause, the plaintiff would have shown a partial performance and entitled himself to a modification of the penalty, according to the article of the Code above cited, and perhaps would have been bound to pay only the balance of the hire with legal interest, as his part of the contract consisted purely in the payment of money. If we permit the plaintiff now to recover thirteen hundred and fifty dollars we destroy the reciprocity of the contract; and in effect permit him to cumulate an action to recover back what was paid on a contract, upon the failure of the consideration which is in effect, a cancelling of the contract, with an action for damages for its non-execution. But it is contended that the redhibitory action is an example of the contrary rule; that when the vendor knew of the vices of the thing, the

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But where a penal clause in a contract fixes the amount of damages in case of non-performance by either party, and there is a part performance by one of them, the court may modify the penalty accordingly.

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So where one party advances half the sum stipulated in the performance of a contract, which has a penal clause of one thousand dollars in case of failure, and the other party fails to complete his part, the former cannot recover back the sum advanced and the penalty too; he can only recover the latter sum.

vendee is entitled not only to a rescision of the sale, but to damages. That proceeds on the ground of a fraud having been committed, and the exception itself proves the general rule.

Upon the whole we are satisfied that our former judgment was erroneous in this particular.

It is therefore ordered that the judgment heretofore rendered be set aside, and it is further adjudged and decreed that the judgment of the Parish Court be reversed and annulled; that the Plaintiff recover of the defendants one thousand dollars, with interest at five per cent. from judicial demand with costs in the Parish Court, the costs of the appeal to be borne by the plaintiff and appellee.

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APPEAL FROM THE COURT OF THE SECOND JUDICIAL DISTRICT.

The formalities required in a will, are matters of strict law, and it is null if they are not complied with.

If a will under private signature be signed in the presence of three witnesses and on the next day a supplement is made to the original, signed by the testator and five witnesses, the first proceeding will be laid out of view, and the last considered as legalizing the whole instrument.

A foreigner not naturalized, who is *residing* in the parish, has been some years in the United States, and has no other domicile in the state, is a competent witness to a will.

The plaintiffs are the collateral relations, and claim to be the heirs, and legal representatives of their deceased brother Hypolite Gaudé, who died in the parish of Lafourche, without leaving ascendants or decendants; they allege that Eulalie Baudoin, widow of the deceased, is in possession and claims his succession, estimated at about six thousand dollars, as his testamentary heir under a nuncupative will, which they allege is null and void for the following reasons:

1st Because it was not written or dictated by the deceased, but was written or caused to be written by the relations of the instituted heir who were interested, and it was signed at a moment when the deceased was not in the possession of his proper faculties.

2d. Because said instrument is only attested by three witnesses.

3d. That the supplement to said will by which its imperfections are attempted to be cured, is defective, because not written, caused to be written or dictated by the deceased, but was caused to be written and prepared by a relation of the testamentary heir, who was interested, and signed by the testator, when his mind was in feeble and deranged by disease.

4th. Because one of the witnesses to said supplemental will had no legal residence in the parish.

5th. Because two others are incompetent on the score of interest; the plaintiffs pray that the defendant be cited, and that on proof of any of the facts alleged that the will be declared null and void.

A copy of the will is annexed to the petition. It is dated the 7th of November, 1832, and is a private act, signed by the testator and three witnesses, residing in the parish. On the 8th of November, the next day a supplement to the original will reciting and conforming its authority and validity was drawn up at the foot of it, and signed by the testator and five witnesses, residing in the parish. They state they found the testator sick in bed, but of sound mind. The will thus made and executed, was duly admitted to probate.

The testimony shows that one of the witnesses is a native of France, not naturalized, and came to Louisiana eleven years ago; his occupation is that of a teacher in private families, and was residing in the parish in this capacity, when he attested the will.

This district judge was of opinion the formalities of the law were complied with, and that the will was valid. He gave judgment for the defendant.

The plaintiff appealed.

Wheeler and Taylor, for the plaintiff.

1. A nuncupative testament under private signature, must be written by the testator, or be caused to be written by him, and the fact must appear on the face of the instrument

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or the will is null, as it cannot be proved by parole evidence.
La. Code 1568, 1574, 2256.

2. The instrument purporting to be a testament and dated on the 7th of November 1832, was signed by but three witnesses, when more might have been procured, as is evident from the attempt to give it validity on the following day. *La. Code* 1576. 1 *Mar. N. S.* 488.

3. The instrument executed on the 8th of November, (the following day) is not a will or testament in itself, as it contains no disposition of any property, nor does it form part of the one executed the day before. If it be any thing, it is to be looked on as a recognition or confirmative act, and can have no force or effect because it does not contain the substance of the disposition of the property, or make mention of the defect in the previous one and the intention of remedying it. *La. Code* 2252.

4. One witness to the instrument executed on the 8th of November was a foreigner not naturalized and without the legal residence. Without him the number required by law is not complete, since it is not shown that more could not be procured. *La. Code* 1587, 1576, 42. *Moreau's Digest* 2d vol. 308, 309.

5. The formalities required in a will are matters of strict law and it is null if they are not complied with.

Nicholls and McAllister, for appellee.

1. The will is clothed with all the formalities required by law.

2. Three witnesses are sufficient in the country if a greater number could not be procured. *C. Code art.* 1576. 12 *Martin* 503.

3. More than three subscribing witnesses could not be procured on the emergency of executing the will before dissolution.

4. The witness objected to was competent as he resided in the parish.

BULLARD, J., delivered the opinion of the court.

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This suit was instituted by the collateral heirs of one Gaudé to annul a testament by which he bequeathed to the defendant, his widow, the whole of his estate. The testament was declared valid by the District Court, and the plaintiff appealed.

The appellants rely in this court on the following points:

1. That a nuncupative testament under private signature must be written by the testator or caused to be written by him and that fact must appear on the face of the instrument under pain of nullity. *La. Code*, 1568, 1574, 2256.

2. The instrument purporting to be a testament dated on the 7th of November, was signed only by three witnesses when more might have been procured. *La. Code*, 1576, 1 N. S. 488.

3. The instrument executed on the 8th November is not a testament as it contains no disposition of property, nor does it form part of the one executed the day before. That it is to be regarded merely as confirmative and can have no effect. *La. Code* 2252.

4. One witness to the instrument executed on the 8th was a foreigner, not naturalized and without legal residence; without him the number required by law is not complete, since it is not shown that more could not be found. *La. Code* 1587, 1576.

5. The formalities required in a will are matters of strict law and it is null if they are not complied with.

Assuming this last proposition as one of undoubted truth in our jurisprudence, one which this court has uniformly recognized, we proceed to examine the 3d and 4th points, because the opinion which we have formed on these will render it unnecessary to consider the others.

The will which the plaintiffs seek to annul purports to be a nuncupative testament under private signature, and its validity will depend on the question whether the formalities required for that class of wills have been complied with. The

The formalities required in a will are matters of strict law, and it is null if they are not complied with.

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second clause of this kind of the 1574th article of the Code which treats of this kind of wills, declares that "it will suffice if in the presence of the same number of witnesses the testator presents the paper on which he has written his testament or caused it to be written out of their presence, declaring to them that that paper contains his last will." The last article provides that, "in either case the testament must be read by the testator to the witnesses, or by one of the witnesses to the rest in presence of the testator; it must be signed by the testator if he knows how or is able to sign, and by the witnesses or at least two of them, in case the others know not how to sign, and those who do not know how to sign, must affix their mark. This testament requires no other formality than those prescribed by this and the preceding article."

If a will under private signature be signed in the presence of three witnesses and on the next day a supplement is made to the original signed by the testator and five witnesses, the first proceeding will be laid out of view, and the last considered as legalizing the whole instrument.

The proceedings which took place on the 7th of November may be laid entirely out of view. If on that occasion a sufficient number of witnesses was not present and some other solemnities required for a nuncupative testament were not observed, it is not easy to perceive how they could vitiate what took place on the eighth. We think the maxim of law strictly applicable "*utile per inutile non vitiatur*" and the doings of the seventh must be considered as not written. On the following day five persons, who appear to be competent witnesses, assembled at the house of the testator whom they found of sound mind though sick and in bed. In their certificate of what was done and said on the occasion which is on the same paper containing the testamentary dispositions, they go on to say; we give the words of the original. "Et là étant tous les cinq témoins, le dit Gaudé nous a présenté ce papier, qui nous a-t-il dit, contient son testament et ses dernières volontés, sur quoi moi Frederick Blanc un des dits témoins ai lu au dit testateur et aux autres témoins ce que est écrit ci-dessus et de l'autre part, apres laquelle lecture le dit testateur a déclaré que ce que je venais de lui lire contenait bien ses dernières volontés et que la signature ci-dessus était lasienne, faité au presence de trois témoins qui ont aussi signé ci-dessus. En fui de quoi nous avons signe en la chambre susdite avec le dit testateur et en sa presence, apres nouvelle

lecture faite." The will is then signed by the testator again and the five witnesses, three of whom had signed the same paper with the testator the preceding day.

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It appears therefore, that in strict and literal compliance with the articles of the Code above recited, this testament was produced to the five witnesses, declared to be the will of the testator by himself, read over twice in his presence and in presence of the witnesses by one of them and signed by the testator and the witnesses.

But it is urged that one of the witnesses was incompetent, that he was a foreigner not naturalized in the country and without legal residence. It appears that he was a tutor in a private family, actually residing at the time in the parish where the will was made; that he had been living there some months with the intention to continue there at least until the end of the year, and that he had been some years in the United States. It is clear from the evidence that the witness did not reside out of the parish, and had no other domicile in the state. We think that sufficient and that he was a competent witness.

A foreigner not naturalized, who is residing in the parish, has been some years in the United States, and has no other domicile in the State, is a competent witness to a will.

It is, therefore, ordered, adjudged and decreed by the court, that the judgment of the District Court be affirmed with costs.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

Making diligent inquiry for the maker of a note and to find his domicile, but without effect, in order to make demand of payment, will excuse the want of a formal demand.

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demand necessary to be made on makers of notes or acceptors, or drawers of bills. What will constitute a legal demand of payment so as to bind endorsers must depend on the commercial law.

Interest will be allowed on protested notes, and on those given for the price of slaves purchased, from the time when they are due and payable.

Notice of protest for non-payment by the drawer given to the endorsers, by leaving it at their dwelling houses, is sufficient.

This is an action against the drawer and endorsers of a promissory note for one thousand three hundred and twenty five dollars, given to the plaintiff in New-Orleans, as the price of two slaves purchased from the latter, the payment of which is also secured by mortgage retained on the slaves. The note is dated the 23d of November 1831, and payable in all the month of March 1833. It was put into the Bank of Louisiana for collection. The notary public states in his protest of the note for non-payment, that he "made diligent inquiry at several places of public resort in this city and elsewhere for the drawer of said note, in order to demand payment thereof, but could not find him, or any person who could inform him where he was to be found." In his certificate the notary states protest was duly notified to the parties by letters written by him on the 3d day of April 1833, and served on them respectively in the following manner: "by delivering the said notices for the said endorsers, Bezou and Franklin, (the plaintiff and nominal endorser,) to them and by delivering the letter for G. de Montagnac, to a person at her house."

Verbois, the drawer, in his separate answer admits his signature to the note; and avers he has always been ready and willing to pay it without interest and costs of protest, but that the plaintiff refused to receive it; that he is not liable for costs and interest because no legal protest was made; that he had a known domicil in the city, known to the notary who made the protest; and that he has tendered

the principal which was refused; he prays that he may be exonerated from paying interest and costs of every kind.

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Emelie Bezon and *G. de Montagnac*, the endorsers, in their separate answer admit their respective signatures on the back of the note, but plead a general denial and aver the note was not legally protested, and that they were not legally notified of its dishonor; and that no amicable demand was made of them before suit, therefore they pray to be dismissed with their costs allowed them.

On the trial the amicable demand was admitted.

Dreux, testified that he knows *Verbois*, the drawer of the note; that in April 1831, he lived in Casa Calvo street, in the city of New-Orleans, in the same place where he lives now; that he is a married man and is generally known.

The district judge was of opinion that there was not a sufficient demand of payment made on the drawer either to bind the endorsers or to compel the former to pay interest; "that the debtor can only be put on his defence by a demand of payment at his domicile, and it does not appear to the court that diligence was used to ascertain the domicile." There was no legal demand of the maker and he is not bound to pay interest as on a promissory note protested. The endorsers are therefore discharged.

Judgment was rendered against the defendant, *Verbois*, for the amount of the note, with legal interest from judicial demand and the costs of suit; and that the mortgaged slaves be seized and sold to satisfy the judgment; dismissing the endorsers with their costs. The plaintiff appealed.

This cause was argued by *Mr. Leigh*, for the plaintiff and appellant, and by *Mr. Roselius*, for the defendants and appellees.

BULLARD, J., delivered the opinion of the court.

The counsel for the appellant claims the reversal of the judgment rendered in the District Court, on two grounds.

1. That the judge *à quo* erred in thinking that the en-

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dorsers of the note sued on were absolved from liability on account of the irregularity in the protest made by the notary.

2. That he erred in refusing to give the payee of the note interest from the day said protest was made.

The promissory note sued on is dated at New-Orleans, and no particular place of payment is given; according to the usage of the place it was deposited for collection in the Bank of Louisiana; and on the last day of grace the notary who made the protest certifies that diligent enquiry was made at several places of public resort in this city and elsewhere, for the drawer of the note, in order to demand payment, but he could not be found, nor any person who could tell where he was to be found; whereupon the note was protested for non-payment, and on the following day written notice of protest was left at the houses of the two endorsers. A clerk of the notary testified on the trial that he inquired at the Bank and of several persons at the coffee house, that he knows the defendant, Verbois, but not where his domicile is; he could not recollect of what persons he made the inquiry. A witness for the defendant certifies that he knows Verbois; that in April 1833, he lived with his mother in Casa Calvo street, where he now lives.

Making diligent inquiry for the maker of a note and to find his domicile, but without effect, in order to make demand of payment, will excuse the want of a formal demand.

The act of March 1827, has not introduced any new rule as to the demand necessary to be made on makers of notes or acceptors, or drawers of bills. What will constitute a legal demand of payment so as to bind endorsers must depend on the commercial law.

There is no evidence to show that the holder of the note or the notary knew the domicile of the maker; and we are of opinion that making diligent inquiry for the maker and for his domicile without effect, excuses the want of a formal demand. We concur in opinion with the district judge, that the act of 1827 has not introduced any new rule as to the demand of the makers of promissory notes or acceptors, or drawees of bills of Exchange. What will constitute a legal demand of payment so as to bind endorsers must depend on the commercial law, independently of the act of 1827. *Chitty on Bill, 337, and in notes.*

The plaintiff was entitled to interest on two grounds: first, because the note was protested for non-payment, and secondly, because it was given for the price of slaves

purchased of the plaintiff, and which were mortgaged to secure the payment of the note. 3 N. S. 185.

Notice of non-payment given to the endorsers by leaving it at their dwelling houses appears to us sufficient.

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It is therefore ordered, adjudged and decreed, that the judgment of the District Court be reversed and annulled, and that the plaintiff recover of the defendants, Nicolas Verbois, Emelie Bezon, and Gerard de Montagnac *in solido*, the sum of thirteen hundred and twenty five dollars, with interest at five per cent. from the third of April 1833, and costs in both courts; and it is further ordered that the mortgaged slaves be first seized and sold to satisfy this judgment.

Interest will be allowed on protested notes, and on those given for the price of slaves purchased from the time when they are due and payable.

Notice of protest for non-payment by the drawers given to the endorsers by leaving it at their dwelling houses is sufficient.

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APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

The purchaser of property at sheriff's or marshal's sales, is entitled to the sum which he really paid and which must be reimbursed in case of eviction, the consideration having thereby absolutely failed.

Sheriffs, marshals and constables are directly responsible so far as their negligence or want of skill, in the execution of the duties of their offices, cause a direct injury, but not for losses remotely consequential and such as grow out of a failure to gain or make profit.

An attorney at law whose name does not appear on the record, and who has not been employed in the suit by the party, although he had previously been engaged in a case remotely connected with it, has no authority to receive money from the marshal on account of such party. On the attorney's authority being disavowed, the marshal will be responsible for the re-payment of the money.

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Where a purchaser at a marshal's sale is afterwards evicted on the ground that the property was not legally sold, the only injury he sustains is the amount which he paid for the property.

Seizing creditors of property sold under execution are responsible to the purchaser no further than for the re-imbursement of the purchase money.

The plaintiff alleges that on the 16th of March 1829, he became the purchaser of two lots in the city of New-Orleans at a public sale by the city marshal, under an execution issued from one of the city courts against said lots by the corporation for taxes; and that by the tortious and illegal seizure and sale of said lots when no taxes were due; and by the neglect of the marshal to observe the formalities of the law in making the sale, he has been evicted therefrom after making valuable improvements; in consequence of which he alleges the corporation and the marshal are jointly and severally responsible to him for the present value of the lots which he estimates at four thousand dollars, and for the improvements thereon valued at one thousand five hundred dollars; for the whole amount of which he prays judgment against the corporation and the city marshal jointly and severally.

The defendants answered separately, the corporation pleaded the general issue; and that the persons by whom the plaintiff charges he was disturbed and evicted had no right or title to said property.

The city marshal pleaded a general denial, and that the plaintiff had no right of action against him and prays to be dismissed. He subjoined the plea of prescription of one year.

The testimony shows that in 1828, the corporation of New-Orleans obtained judgment in one of the city courts against two lots in faubourg Lacourse for arrearages of city taxes of fourteen dollars and ten cents on one, and six dollars and ten cents on the other, together with costs, which were advertised and sold under executions issued on said judgments by the city marshal and Wm. M. Lambeth the present plaintiff became the purchaser for the sum of three hundred and ten dollars cash for one, and two hundred and twenty dollars

in cash for the other. In December 1830, he entered into an agreement with one Nash to give him one thousand eight hundred dollars in money and the lots purchased at marshal's sale, in consideration of Nash's erecting certain buildings for him. The titles to be executed on delivery of the keys of the buildings. Under this agreement Nash proceeded to make improvements on the lots to the value of six hundred dollars. In March 1831, one Delogny and others the real owners of said lots, instituted suit against Nash as the possessor for their recovery. Nash answered that he held the lots of Lambeth, and prayed that the latter might be cited to defend the suit. Lambeth appeared and called the corporation in warranty and claimed the value of his improvements. Lambeth was evicted and Delogny recovered the lots on the ground that there were no regular and legal advertisement of this sale by the marshal. Lambeth was not allowed for the improvements, but as they were put on the ground by Nash he was allowed to remove them. *Vide 3 La. Rep. 425.*

Delogny, in March 1832, brought suit against the corporation before judge Preval, to annul the original judgment under which the lots were sold. Judgment of nullity was pronounced on the ground that the taxes assessed at the time the lots were decreed to be sold were paid.

The lots having originally sold for much more than the taxes and costs claimed to be due on them a large balance remained in the marshal's hands. Mr. Preston who had acted as Lambeth's attorney in defending the suit of Delogny, but was regularly employed by one Fitzwilliam to defend a similar suit, who after the eviction inquired of the counsel what further steps were necessary; Preston replied that nothing else could be done, but get back the money paid by the parties to the marshal; and under this authority gave a receipt to the marshal for the balance in his hands, which had been paid by Lambeth for the purchase of the lots. On application to the city council they refused to do any thing more than refund the money which had been received for taxes on said lots.

Lambeth disavowed Preston's authority to receive the

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balance of the purchase money from the city marshal, on which he tendered it back to the marshal who refused to receive it. He then deposited it in the City Bank where it now is. He received it on the 19th of May 1832, and between that time and March 1833, he never informed the plaintiff he had received it. Preston had no other authority whatever to receive this money, except what might be inferred from the simple fact of his having previously defended Lambeth, with his own client Fitzwilliam, against the suit of Delogny. This receipt was offered in evidence by the counsel for the defendants, when the counsel for the plaintiff objected to its admission in evidence, on the ground that Mr. Preston was not authorized to receive the money as Lambeth's counsel, and produced the plaintiff's affidavit disavowing his authority to receive it; but the court admitted it, and rejected the affidavit, because to admit it, would be to allow him to contradict by affidavit, the *presumption* that Mr. Preston was his attorney duly authorized by him, without the benefit of a cross-examination by the defendant. A bill of exceptions was taken to the opinion of the court.

The district judge considered the receipt of the money by Preston as binding on the plaintiff, and that the corporation was only bound to refund what it had received with costs, and gave judgment accordingly for the plaintiff against the corporation for fifty-five dollars and seventy-three cents and costs of suit, and in favor of the heirs of the city marshal.

The plaintiff appealed.

Slidell, for the plaintiff.

1. The duties of the city marshal are the same as those of sheriffs, *see section 10 of act organizing city courts, acts of 1830 p. 188*. These duties are defined by act of 25th of March 1813, and *Code of Practice, art. 760, &c.* In exposing property for sale, they are bound to see that all the formalities of law are observed and are responsible for all damages which may be caused to others by a neglect of such formalities. *See La. Code, art. 2294, 2295. 11 Toullier p. 214, 265. 10 Martin 308.*

2. The marshal having acted under the orders of the mayor, aldermen, &c. they are responsible for his doings. *La. Code* 2299. This responsibility should be the more rigidly enforced because they were wrong doers *ab initio*, the debt for which the property was seized having been paid. They are at all events responsible for the price of the sale. See *Code of Practice*, art. 711, 712.

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3. Attorneys at law as such have no right to receive money, excepting in suits where they are specially employed; their authority may be inquired into in all cases, if denied. 9 *Martin* 88. 12 *Martin* 388. 8 *Martin*, N. S. 235.

4. The receipt by an attorney acting without authority of the balance of the price of the sale from the marshal, cannot affect the rights of Lambeth. 3 *La. Rep.* 205. 4 *Martin*, N. S. 145. See also for authority of an attorney to do any act prejudicing a client. 6 *Johnson's Rep.* 53. 8 *Johnson's Rep.* 367.

5. Prescription could only run from the day of eviction under final judgment; until then plaintiff had sustained no injury and had no right of action. 6 *Martin* N. S. 709.

Eustis, for the corporation of New-Orleans, and the appellees.

1. By the statement of the case in petition there is no privity of contract or connexion between the plaintiff and the corporation of New-Orleans or their agents.

2. If any tort was committed by the officers or agents of the corporation, it only affected Delogny the owner of the lots.

3. In no possible event can a purchaser at a sheriff's sale have any recourse against the seizing creditor, except for the money received by the latter from the former.

4. The receipt of the purchase money by the attorney stops the plaintiff from suing for it, or any damages resulting from his alleged eviction.

5. The judge erred in assuming that the corporation received any part of the purchase money, which if received

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ought to have been the subject of a distinct suit and cannot be recovered in this, under the allegations of the petition.

MATHEWS, J., delivered the opinion of the court.

This suit is brought to recover remuneration for damages which the plaintiff alleges he has suffered by the illegal and tortious conduct and gross negligence of the defendants in relation to the sale of two lots in the faubourg Lacourse, which were seized at the instance of the corporation, and sold by the marshal of the city court to pay taxes and other dues assessed on said lots, &c.

The court below rendered judgment against the mayor, aldermen and inhabitants of the city, for the amount of debts and costs received by them in the city court, and dismissed the suit so far as it relates to the claim against the marshal. From this judgment the plaintiff appealed.

The appellant claims not only the amount actually paid by him as purchaser of the lots in question at the sale by the marshal; but also all consequential damages and loss occasioned by his eviction from the property. In truth he claims the full value of the lots, and the improvements made on them through his means at the time of eviction, as might be done if the case were one of warranty.

The facts of the case necessary to be noticed in its decision are the following. Proceedings against these lots were ordered by the corporation in pursuance of provisions of an act of the legislature, which authorised a kind of pursuit *in rem*, against real property in the city unimproved and unoccupied, to enforce payment of taxes, &c. In that suit which was instituted in one of the city courts, judgment was rendered and the lots were sold by the marshal under execution.

The owners of the property afterwards recovered it from the possessors, under the plaintiffs title as derived from the marshal's sale, on the ground of irregularity in the proceedings by virtue of which it was made.

The sale by the marshal being annulled, the plaintiff in the present action, the purchaser, lost the benefit which he

might have obtained from sales and contracts made by him in relation to this property. The judgment which ordered the sale to pay taxes, &c., was subsequently annulled on the ground that no taxes or other assessments were owing on the property which was pursued by the court which had rendered it. The lots are shown to be worth a much greater sum than was paid for them when sold by the marshal, and to recover this amount in addition to the price actually paid is the object of the present suit.

The plaintiff is clearly entitled to a judgment by which the sum really paid by him shall be reimbursed, the consideration of the price having absolutely failed. Such judgment must be rendered in proportion to the several amounts as retained by the marshal or transferred to the use of the corporation.

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The purchaser of property at sheriffs or marshals sales is entitled to the sum which he really paid and which must be reimbursed in case of eviction, the consideration having thereby absolutely failed.

The right to recover more than this is assumed on the part of the plaintiff, as supported by the provisions of the *Louisiana Code* in relation to offences and *quasi* offences. The responsibility of offenders and negligent persons are laid down in broad terms by the articles 2294, 2295. The latter of these is applicable to the cause now under consideration. It is in the following words, "every person is responsible for the damage he occasions not merely by his acts, but by his negligence, his imprudence or his want of skill.

It is contended in the present instance that the loss of property, the value of which is said to be the measure of damages suffered by the plaintiff, in consequence of his eviction, was occasioned by the negligence and unskillfulness of the marshal in not having advertised the sale in a legal manner, for which he is directly answerable, and the corporation indirectly, he being the agent or mandatory.

To give the effect contended for to the article of the Code relied on, would be to make all judicial ministerial officers, such as sheriffs, marshals and constables warrantors of all the property by them sold as agents in the administration of justice; a proposition which as appears to us cannot be supported on any principle of law, reason, justice or equity. They certainly ought to be held responsible so far

Sheriffs, marshals and constables are directly responsible so far as their negligence or want of skill, in the execution of the duties of their offices cause a direct injury, but not for losses remotely consequential and such as grow out of a failure to gain or make profit.

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as the negligence or want of skill has caused a direct injury to the person complaining of such negligence; but not for losses remotely consequential, and such as grow out of a failure to gain. Take the present case as an example to illustrate; what is the direct and real injury done to the plaintiff by the negligence of the marshal, in consequence of which the sale was avoided to the prejudice of the former? it does not extend beyond the amount paid on a void contract of sale, which the heirs of the officer, he now being dead, were bound to defend.

The money which remained in the hands of the marshal arising from the sale by him made, beyond the amount of taxes and costs, was according to the testimony on this subject paid in error to Mr. Preston who had no legal authority to receive it; consequently the former is still liable for this sum to the plaintiff.

An attorney at law whose name does not appear on the record and who has not been employed in the suit by the party although he had previously been engaged in a case remotely connected with it, has no authority to receive money from the marshal on account of such person. On the attorney's authority being disavowed, the marshal will be responsible for the re-payment of the money.

Where a purchaser at a marshal's sale is afterwards evicted on the ground that the property was not legally sold, the only injury he sustains is the amount which he paid for the property.

Seizing creditors of property sold under execution, are responsible to the purchaser no further than for the reimbursement of the purchase money.

The agents of the corporation are charged with having acted tortiously in pursuing property for taxes and other dues when they must or ought to have known that nothing was owing on said property. To say the least of it, this was a very careless and improper proceeding. But the injurious consequences operated immediately on the rights of the original owners, and only indirectly on those of the purchaser at the sale by the marshal. And even in this indirect manner the real and positive injury to him is no more than the amount paid without consideration.

The responsibility established by the *Code of Practice* against seizing creditors, (even admitting the corporation to be liable to any such in the first case, which is doubtful) cannot be extended further than the reimbursement of the price paid by the purchaser, and by them received. *Code of Practice, art. 711, et sequentes.*

The facts of the case do not support the prescription of one year relied on by the counsel for the marshal.

It is, therefore ordered, adjudged and decreed, that the judgment of the District Court against the mayor, aldermen and inhabitants of the city, be affirmed with costs, &c. And

it is further ordered &c., that the judgment of said Court dismissing the suit as against the marshal, be avoided, reversed and annulled, and proceeding here to give such judgment as in our opinion ought to have been given in the court below; it is ordered, adjudged and decreed, that the plaintiff and appellant do recover from the heirs of L. M. Daunoy, late marshal of the city court, five hundred and sixty-seven dollars and ninety cents, with legal interest from judicial demand, and costs in both courts.

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OPINION ON THE RE-HEARING OF THIS CASE.

This case is before the court on a rehearing. Our former judgment condemned the heirs of the marshal of the city courts, (who was a party defendant in the suit,) to pay to the plaintiff five hundred and sixty seven dollars and ninety cents, being the price which he had paid for certain lots of ground situated in the faubourg Lacourse, which had been sold by the marshal under a judgment obtained by the corporation for taxes and against a non-resident of the city. The sale made by the marshal was annulled on account of informalities in his proceedings, and the lots in question were recovered by Delongny the original proprietor, in a suit against one Nash who disclaimed title and the action proceeded against Lambeth to final judgment, &c. The evidence of the present case shows a compromise between Nash, and the plaintiff, by which the latter agreed to pay him six hundred dollars, in consequence of some contract which had taken place between them in relation to these lots at the time when Lambeth considered himself as owner under the sale by the marshal; and the course of our former judgment, now complained of, is that this sum was not adjudged to the plaintiff as damages resulting directly from the negligence and misconduct of the officer in advertising and selling the property seized for the payment of taxes and the dues to the city. Perhaps sheriffs and other ministerial officers ought to be held responsible for all damage and injury which purchasers of property sold under execution

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may suffer, as a direct consequence of the negligence and misconduct of such officers, in which the formalities required by law and to give validity to such sales were omitted; and loss accruing in consequence of warranty in a subsequent sale by a purchaser at a sheriff's sale illegally conducted, might be considered as a damage of this kind. In the suit above recited, Lambeth did not appear as Nash's warrantor. He defended as the real owner, and in that case the tenant obtained a judgment authorising the removal of the buildings by him put on the lots in dispute; a proper defence in that action ought perhaps to have ended in a decree of payment of the value of those improvements by the original owner, as they had been made by a possessor in good faith. The defendants seem however to have been contented with the decree which authorised the removal of these edifices. They are certainly not entitled to both the thing and its value.

We are of opinion that the marshal cannot be held legally responsible for the consequences of the compromise between Lambeth (the present plaintiff) and Nash, whatever might have been his liabilities consequent on a sale to Nash, on eviction and damages recovered in an action of warranty.

It is therefore ordered, &c., that our former judgment be and remain undisturbed.

MIRANDA vs. CITY BANK OF NEW-ORLEANS.

APPEAL FROM THE PARISH COURT FOR THE PARISH AND CITY OF NEW-ORLEANS.

A bank or other agent, undertaking to collect a note or bill endorsed is bound to use the same diligence, in giving notice of protest and demand of payment of the drawer to the endorser as the holder, and is liable to the holder on failure.

The bank is responsible for the acts of the notary, in not giving due notice of protest to the endorser; and the *onus* rests upon it as agent, to show that no damage resulted from such neglect, in order to be relieved from its liability.

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Where a bank or agent receives a note or bill for collection, and fails to give notice, and on suit being brought against the endorser, he is exonerated for want of notice of protest, the bank cannot excuse itself on the ground that it was not made a party to the suit; unless it can show that sufficient legal notice was given to the endorser.

Notice to an endorser residing in New-Orleans, put in the post office, without showing the notary was ignorant of his domicile, or used due diligence to find it, is insufficient to bind the endorser.

The proceedings of the creditors of the drawer of a note, at which the endorser attended in relation to his endorsement, are not admissible in evidence by the bank in a suit by the holder of the note against it, for failing to give notice to the endorser by which he was released, to show he has been indemnified, especially when this matter is not pleaded, and because it is between persons not parties to the present suit.

Where the defendant pleads a general denial, and that he was not party to a suit by which the endorser was released for want of notice, he cannot offer evidence, to show the endorser has been secured against his endorsement.

It is not to be presumed that the endorser intended to make himself unconditionally liable and waive a demand on the drawer, and protest and notice to himself, because he attended a meeting of the creditors of the drawer, to be secured against his endorsement.

This is an action by the holder of a promissory note against the City Bank of New-Orleans, to render it liable for the amount thereof, on the ground of negligence and failure to give legal notice of demand and protest to the endorser, by which he was released. The plaintiff put into the bank for collection a note drawn by Fuentes & Co., and endorsed by Felix Formento, for fifteen hundred and ninety dollars. The notary to whom the note was handed by the bank to be protested, states in his protest "that he made diligent inquiry

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for the drawers of said note, in order to demand payment thereof, but could not find them or any one who could inform him where they were to be found;" and in his certificate he states he notified the *parties* to the note by addressing "letters to them respectively on the day of protest in the following manner," viz: by delivering a letter in person to Miranda, (the nominal endorser) "and by depositing the one for Felix Formento in the post office in this city addressed to him, not being able to find him."

The plaintiff instituted suit in the Parish Court against the endorser, who was exonerated on the ground, that the demand, protest and notice to him was insufficient. Without appealing from that judgment, the holder of the note instituted the present suit against the bank. He prays judgment for the amount of the note with interest and costs in both suits. The cause, at the instance of the counsel for the bank, was submitted to a special jury, who returned a verdict for the plaintiff; and judgment being rendered thereon, the bank appealed.

Cannon, for the plaintiff, urged the affirmance of the verdict and judgment, because they were rendered in accordance with the law and the evidence of the case, and cited *Chitty on Bills, Verbo presentement and protest of bills and notes. 7 Martin 364.*

De Armas, for the defendant, contended that the certificate of the notary public ought to be considered as evidence in favor of the bank. *Vide Acts, March 13, 1827, sec. 1.*

2. The judgment should be reversed and in favor of the bank, because Formento by appearing as a creditor of *Fuentes & Co.*, on account of this endorsement, and voting for himself as syndic, bound himself to pay this note.

3. The defendants ought to have been made parties in the suit against the endorser, in order to have had an opportunity of making a defence thereto.

BULLARD, J. delivered the opinion of the court.

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The plaintiff represents that he placed in the City Bank for collection, and that the bank undertook to collect for him, a promissory note drawn by Fuentes & Co., and endorsed by Felix Formento, all of New-Orleans. That when the note fell due the notary employed by the bank did not present the same to the drawers for payment, though all the members of the firm of Fuentes & Co. were residing in New-Orleans; and that he did not give legal notice to the endorser of its non-payment, by reason whereof the endorser was released from his liability by judgment of the Parish Court. He further alleges that the drawers have become insolvent, and he prays judgment against the bank for the amount of the note with interest since it fell due and the costs of the previous suit against Formento the endorser.

The defendants deny all the allegations which tend to render them liable for the amount of the note. They further say, that if they were even liable to the plaintiff, he has lost his recourse on them, inasmuch as they were not notified of the suit against Formento; that they would have been able to prove on the trial of that cause that Formento had been duly notified of the protest; that shortly after the protest the said endorser acknowledged and confessed that Fuentes & Co., were indebted to him in a certain sum in which was included the amount of the protested note, and for trial of these facts they pray a jury. Accordingly the case was submitted to a jury whose verdict was in favor of the plaintiff, and a motion for a new trial having been made and overruled, judgment was rendered accordingly, and the defendant appealed.

The principles upon which this case must be decided were recognised and settled by this court many years since in the case of *Crawford vs. the Louisiana State Bank*, and of *Montilet vs. the Bank of the United States*. 1 N. S. 214, 365. It was held, that an agent, who receives a bill for collection is bound to use the same diligence in giving notice as the holder; that the bank was responsible for the acts of the notary, and that the *onus* was on the agent to show that the

A bank or other agent undertaking to collect a note or bill endorsed, is bound to use the same diligence in giving notice of protest and demand of payment of the drawer to the endorser as the holder, and is liable to the holder on failure.

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The bank is responsible for the acts of the notary in not giving due notice of protest to the endorser; and the *onus* rests upon it, as agent, to show that no damage resulted from such neglect in order to be relieved from its liability.

Where a bank or agent receives a note or bill for collection and fails to give notice and on suit being brought against the endorser, he is exonerated for want of notice of protest, the bank cannot excuse itself on the ground that it was not made a party to the suit, unless it can show that sufficient legal notice was given to the endorser.

Notice to an endorser residing in New-Orleans, put in the post office, without showing the notary was ignorant of his domicile or used due diligence to find it, is insufficient to bind the endorser.

holder of the bill sustained no damage by the neglect of the agent to make a proper demand, and to give due notice to the other parties to the bill.

The record in the case of the present plaintiff against Formento, the endorser, was read in evidence without objection. It proves that the endorsers had been exonerated because no legal demand had been made on the drawers; and that regular and due notice was not given to the endorsers. But it is contended that the plaintiff ought to have made the bank a party to that suit, and not having done so, he has lost his recourse on them. We cannot yield our assent to that proposition. Even if the bank were to be considered as bound only by personal warranty towards the plaintiff, his recourse on his warranty would not be lost unless the warrantor shows that he could have enabled the plaintiff to recover against the endorser if made a party. But this is not a mere case of personal warranty. The bank undertook to take such steps in relation to the note as to enable the holder to enforce payment according to its tenor, and not upon any subsequent act or undertaking of the parties. It may be said that the judgment in favor of Formento is not conclusive as to the bank, but it only follows that the bank might in this case have shown that in point of fact sufficient legal notice was given to the endorsers. This they have failed to do. The certificate of the notary as to the notice to Formento is in these words; "by depositing the one (letter) for Felix Formento in the post office in this city, addressed to him, not being able to find him." It does not appear that the notary was ignorant of the domicile of the endorser, and that he used due diligence to find it. It appeared in the case against Formento, that no inquiry was made of any of the other parties to the note, and the present plaintiff as nominal endorser to the bank received personal notice of the protest. It appeared in evidence that both the President of the bank and the Cashier, knew the domicile of the drawer Fuentes and Co. By inquiring of them the notary might have made a legal demand of the drawers at their domicile. This was not done.

In the progress of the trial the defendants offered in evidence the deliberations of the creditors of Fuentes & Co., in order to show that Formento had appeared at the meeting and assumed the quality of creditor for a large sum in which this note was included. This evidence was rejected by the court on the grounds, 1st: That the deliberations were had between persons not parties to this suit. 2d: That the proof would be inconsistent with the defence set up in this case; and 3d: That even were the proof admissible it would be irrelevant, as notice of protest is not to be inferred, but must be formally proved. A bill of exceptions was taken to this opinion of the court. We think the court did not err. The defence set up in this case rests on two grounds; 1st, a denial of the allegations in the petition, tending to charge the bank: And 2d, that the bank is released because the plaintiff proceeded against Formento without making them a party. But it is in evidence that the meeting of the creditors of Fuentes & Co., took place before the protest of the note in question; and it is not to be presumed that Formento intended to make himself unconditionally liable for the amount of the note endorsed by him or to waive a demand on the drawer and regular notice as endorser.

Upon the whole we cannot distinguish this case from that of *Montillet vs. the Bank of the United States*, above referred to.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Parish Court, be affirmed with costs.

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The proceedings of the creditors of the drawer of a note, at which the endorser attended in relation to his endorsement, are not admissible in evidence by the bank in a suit by the holder of the note against it for failing to give notice to the endorser by which he was released, to show he has been indemnified, especially when this matter is not pleaded and because it is between persons not parties to the present suit.

When the defendant pleads a general denial and that he was not party to a suit by which the endorser was released for want of notice, he cannot offer evidence to show the endorser has been secured against this endorsement.

It is not to be presumed that the endorser intended to make himself unconditionally liable and waive a demand on the drawer and protest and notice to himself because he attended a meeting of the creditors of the drawer to be secured against his endorsement.

STATE OF LOUISIANA vs. BANK OF LOUISIANA.

APPEAL FROM THE COURT OF THE FIRST JUDICIAL DISTRICT.

All the property of a Bank after payment of its debts and expenses, is the exclusive property of its stockholders for the time being.

EASTERN DIS. The ownership of shares in the capital stock of a Bank by the State
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gives to it precisely the same right which it gives to other stockholders
and no more.

The profits of a Bank are divisible among *all* the stockholders except
 so much thereof as in the discretion of the board of directors, is
 necessary for the safety of the Bank and for the purpose of preserving
 its integrity.

Ownership is the right of natural persons; but a corporation, as a Bank,
 which is an artificial person may hold property for a particular purpose,
 which is *de facto* the property of the real persons composing it.

The net profits arising from the sale of the state bonds by the Bank
 of Louisiana in 1824, belong exclusively to the stockholders *at the time*,
 in proportion to the stock held and actually paid in by them respectively.

The law does not authorise interest to be allowed on the share of profit
 belonging to a portion of the stockholders, which is retained among the
 funds of the Bank for a series of years.

The board of directors of a Bank is invested with discretionary power
 of judging what portion of the profits it is advisable from time to time
 to divide among the stockholders.

A very strong case must be made to require a court of justice to interfere
 with the discretion of the directors in relation to the *quantum* of profits
 of the Bank which they are to divide.

If the directors honestly err in exercising their discretion in managing the
 funds of the Bank, it is not clear that courts possess the power to correct
 their mistakes.

This is an action commenced by the Attorney General, in
 the name and for the use of the state of Louisiana, against
 the Bank of Louisiana, in obedience to a law of the Legis-
 lature passed the 7th March 1834. This law instructs the
 Attorney General to sue the Bank in order to compel it to
 place to the credit of the state, as available means on the

first of July following, the portion of the profits made on the sale of the state bonds by the Bank, belonging to the state; the portion of the profit and loss account of said Bank to which the state is entitled; and all other funds, which in the opinion of the Attorney General, the state may be justly entitled to demand from the Bank. *Vide session acts, March 7, 1834, p. 61.*

On the 4th of April 1834, the Attorney General filed his petition in court, in which he alleges that the sale of the state bonds by the Bank produced over and above the sum of two millions, the state's portion of the capital stock, the net sum of three hundred and twenty one thousand eight hundred and twenty two dollars clear profit, which belonged to the stockholders at that time, in proportion to the amount of stock held by them respectively; that the proportion of the state to these profits is as two millions are to one hundred and thirty eight thousand eight hundred and forty dollars, the amount of stock paid in by individual stockholders, and amounting to the sum of three hundred thousand eight hundred dollars, which with the accruing interest according to the statement of the treasurer annexed, forming an aggregate sum of four hundred and fifty five thousand five hundred and thirty six dollars, he prays may be placed to the credit of the state on the books of the Bank, and applied to the payment of the first series of the state bonds which fall due the first day of July 1834, to the amount of six hundred thousand dollars. The Attorney General further states that according to the estimate of the treasurer, of the operations of the sinking fund, the state is entitled to three hundred and forty one thousand five hundred and fifteen dollars, which he prays may be applied to the payment of said state bonds. And he further alleges and prays that the Bank be required to divide all the profit and loss account above two hundred and fifty thousand dollars, which he states amounts to two hundred and eighteen thousand dollars, and apply the portion of the state to the payment of said bonds.

The estimate of the State Treasurer of the profits arising from the sale of the State bonds is as follows:

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EASTERN DIS. "Statement of the share of the state in the sale of the
June, 1834. bonds, with interest thereon from January 1826 to July
1834.

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The share of the state in the profits is	\$300,800
Interest from 1826 to 1827 at 5 per cent. is	15,040
	<hr/> 315,840
Interest on \$315,840 from 1827 to 1828 is	15,792
	<hr/> 331,632
Interest on \$331,632 from 1828 to 1829 is	16,587 60
	<hr/> 348,219 60
Interest on \$348,219 60 from 1829 to 1830 is	17,411
	<hr/> 365,630 60
Interest on \$365,630 60 from 1830 to 1831 is	18,281 50
	<hr/> 383,912 10
Interest on \$383,912 10 from 1831 to 1832 is	19,195 60
	<hr/> 403,107 70
Interest on \$403,107 70 from 1832 to 1833 is	20,155 30
	<hr/> 423,263
Interest on \$423,263 from 1833 to 1834 is	21,163 15
	<hr/> 444,426 15
Interest from January 1 to July 1, 1834, on \$444,426 15,	11,110 60
Total, . . .	<hr/> <u>\$455,536 75</u>

(Signed) F. Gardère, state treasurer.

"Statement of the operation of the sinking fund belonging
to the state, in the Bank of Louisiana.

On the 2d of August 1825, the Bank had to advance to
the state for the payment of the interest on its bonds, the
sum of thirty thousand dollars (\$30,000.) This amount
was reduced on the 24th of July 1826, to ten thousand
dollars (\$10,000) by the increase of the dividend, and the
Bank is consequently entitled to claim interest on thirty

thousand dollars, for one year viz: from the 2d of August 1825 to 24th July 1826, at 5 per cent. per annum, is \$1,500.

On the 23d of July 1827, the surplus of dividend upon the stock of the state after paying the annual interest on the bonds, was twenty thousand dollars, as follows:

Dividend on 2,000,000 at 4 per cent. . . .	\$80,000
Interest on 2,000,400 at 5 per cent. . . .	60,000
Difference, \$20,000	

The state, on this day, after paying the Bank the amount advanced, had ten thousand dollars placed to the credit of the sinking fund. The Bank is entitled to claim interest on ten thousand dollars for one year, say five hundred dollars, which added to the one thousand five hundred dollars mentioned above, forms a total of two thousand dollars.

From July 1827, up to the present time, the sinking fund has increased yearly forty thousand dollars, as the accounts of the Bank will show, viz:

1827, July, balance to the credit of the sinking fund, \$ 10,000

1828, January, interest on ten thousand dollars, from July to date, at five per cent. per annum is \$ 250

Surplus of dividends after paying interest is \$ 20,000

1828, July, interest on thirty thousand dollars from January to date is \$ 750

Surplus dividend, \$ 20,000

1829, January, interest on fifty thousand dollars from July to date is \$ 1,250

Surplus dividend, \$ 20,000

Hence it appears that on the last day of December 1828, the account of interest is nearly balanced with a small difference of two hundred and fifty dollars in favor of the state.

(Signed) F. Gardère, state treasurer.

EASTERN DIS.
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CASES IN THE SUPREME COURT

<div> <div>EASTERN DIS.</div> <div>June, 1834.</div> <hr/> <div>STATE OF</div> <div>LOUISIANA</div> <div>VS.</div> <div>BANK OF</div> <div>LOUISIANA.</div> </div>	1829, January, amount to the		
	credit of the sinking fund,	\$ 70,000	
	1829, July, interest on seventy		
	thousand dollars from Jan-		
	uary to date is	\$ 1,750	
	1829, July, dividend on two		
	millions at four per cent. is \$ 80,000		
	Interest on bonds	60,000	
	Surplus	\$ 20,000	\$ 20,000
			\$ 91,750
	1830, January, six months interest on ninety		
	one thousand seven hundred and fifty		
	dollars is	2,293 75	
	Surplus dividend <i>ut supra</i> ,	20,000	
			\$114,043 75
	1830, July, six months interest on one hun-		
	dred and fourteen thousand and forty three		
	dollars and seventy five cents is	2,851 10	
	Surplus dividend	20,000	
			\$136,894 85
	1831, January, six months interest on one		
	hundred and thirty six thousand eight hun-		
	dred and ninety four dollars and eighty		
	five cents is	3,422 37	
	Surplus dividend	20,000	
			\$160,317 22
	1831, July, six months interest on one hun-		
	dred and sixty thousand three hundred and		
	seventeen dollars and twenty two cents is	4,007 92	
	Surplus dividend	20,000	
			\$184,325 14
	1832, January, six months interest on one		
	hundred and eighty four thousand three		
	hundred and twenty five dollars and four-		
	teen cents is	4,608 12	
	Surplus dividend	20,000	
			\$208,933 26

<i>Brought Forward.</i> . .		\$208,933 26	EASTERN DIS.
1832, July, six months interest on two hundred and eight thousand nine hundred and thirty three dollars is	5,223 32		STATE OF LOUISIANA
Surplus dividend	20,000		VS.
			BANK OF LOUISIANA.
		<u>\$234,156 58</u>	
1833, January, six months interest on two hundred and thirty four thousand one hundred and fifty six dollars and fifty eight cents is	5,853 90		
Surplus dividend	20,000		
		<u>\$260,010 48</u>	
1833, July, six months interest on two hundred and sixty thousand and ten dollars and forty eight cents is	6,500		
Surplus dividend	20,000		
		<u>\$286,510 73</u>	
1834, January, six months interest on two hundred and eighty six thousand five hundred and ten dollars and seventy three cents is	7,162 75		
Surplus dividend	20,000		
		<u>\$313,673 48</u>	
1834, July, six months interest on three hundred and thirteen thousand six hundred and seventy three dollars and forty eight cents is	7,841 81		
Surplus dividend	20,000		
		<u>\$341,515, 29</u>	

March 14th, 1834.

(Signed) F. Gardère, state treasurer."

The counsel for the Bank excepted to the part of the petition in relation to the profits made on the sale of the state bonds, on the ground that the Bank had been sued for this fund in 1827, and judgment pronounced in its favor,

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and that this matter was now *res judicata*. *Vide 5 Martin, N. S. 337.* And further that the Bank is not responsible for interest; or in any other manner on account of the sinking fund, but that the same is under the exclusive control of commissioners; and they plead the general issue to the merits, except as to matters specially admitted.

The district judge after examining the evidence of the case and hearing the arguments of counsel, ordered two hundred and one thousand and twelve dollars of the profits made on the sale of the bonds, to be paid over to the commissioners of the sinking fund; and that one hundred thousand dollars of the surplus fund, for profit and loss account, be divided among the stockholders. From this judgment both parties appealed.

This cause was argued at this term by *Mr. Mazureau, Attorney General*, for the state, and by *Mr. Pierce* and *Mr. Slidell* on the part of the Bank of Louisiana.

MARTIN, J., delivered the opinion of the court.

The Attorney General alleges that the state is owner of twenty thousand shares of the capital of the bank, of the value of two million dollars, being one half of said capital, for which bonds of the state for the sum of two million four hundred thousand dollars, were furnished to the bank, payable in instalments of six hundred thousand dollars each on the 1st days of July 1834, 1839, 1844 and 1849, and bearing interest at five per cent. a year, payable semi-annually; and according to a provision of the charter, these bonds were made payable to the president and directors of the bank, who were empowered to endorse them, and all the expenses attending the issuing of these bonds were to be borne by the bank. That the bank was to sell these bonds for specie, at a rate not under that at which it received them from the state, viz: one hundred dollars of bonds for eighty-seven and one-third dollars of specie. The bank was empowered to contract for the payment of the semi-annual interest accruing on the bonds, in any other place than the city of New-

Orleans, but the state stipulated that any additional charge or expense as for loss or exchanges or otherwise should be borne by the bank, and it was agreed that any benefit by gain of exchange or otherwise, resulting from the payment of such interest, at such other place than New-Orleans should be enjoyed by the bank. That the sale of these bonds has produced over and above the two million dollars, in payment of which they had been furnished by the state, a profit of three hundred and twenty-one thousand eight hundred and sixty-two dollars, at a time when the capital of the bank subscribed for, and paid in by other stockholders than the state, amounted only to one hundred and thirty-eight thousand eight hundred and forty dollars, and the profit thus made was the rightful property of the stockholders then existing, in the proportion of the portion of the then capital by them respectively paid in; that the portion of the capital then paid in was two million one hundred and thirty-eight thousand eight hundred and forty dollars, equal to twenty-one thousand three hundred and eighty-eight shares; twenty thousand of which belonged to the state, giving right to a dividend of three hundred thousand eight hundred dollars, for which the bank ought immediately to have credited the state, which it refused to do, under the pretence that its contract with the purchaser of the bonds contained a clause by which certain resolutions of the board of directors had been incorporated in the contract, and according to which the bank was bound to forbear any division of the profits it might make on the sale of the bonds of the state, except in proportion as the dividends on the stockholders by the state shall have left a surplus, after paying the semi-annual interest to be applied to the redemption of the bonds until the amount of four hundred thousand dollars shall have been redeemed.

The Attorney General denied the right of the board of directors to pass this resolution, or to incorporate it in the contract for the sale of the bonds, and averred that, if all, or any important part of the bonds were sold under the faith of the bank pledged by the resolution, the effect of the contract could not be such as to impair the States' right to these pro-

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fits, and it was the duty of the board to have placed the shares of the state therein, under the administration of the treasurer of the state, and the president and cashier of the bank as the commissioners of the sinking fund, created by the charter and in whose hands the bank was bound to place the surplus of every dividend, after paying the semi-annual interest, to constitute a fund for the redemption of the bonds.

The Attorney General urged the claim of the state to an interest of five per cent. at least on three hundred thousand eight hundred dollars, from January 1st 1826, to July 1st 1834, which added to the principal, makes an aggregate sum of four hundred and fifty-five thousand five hundred and thirty-six dollars and seventy-five cents, which he prays the court to declare an available sum due to the state on the 1st of July next, applicable by the bank to the redemption of the first series of bonds payable on that day, which the bank refuses to allow under the pretence; 1st, that until all the state bonds are paid, it is impossible to ascertain the amount of the profits made on their sale; 2d, that of such profits when known, the state is entitled to one moiety only; 3d, that the state has not in bank any fund available for the payment of the bonds, except three hundred and twenty-eight thousand dollars, including the probable dividend payable on the 1st of August next.

The Attorney General complains that the commissioners of the sinking fund ought to have a much larger sum for the use of the state; that mentioned by the bank is composed of the surplus semi-annual dividends belonging to the state, out of the dividends declared until now, after paying the semi-annual interest due by the state on the bonds and interest upon the sinking fund at five per cent., which was allowed by the bank from the year 1830 only, while it ought to have been allowed from the moment the first item on the credit of the state was entered, and accordingly the state claims this deficiency of interest which, according to a statement annexed to the petition, makes the sum due to the state on the sinking fund three hundred and forty-one thousand five hundred and fifteen dollars and twenty-nine cents on the 1st day

of July next, which added to four hundred and fifty-five thousand five hundred and thirty-six dollars and seventy-five cents above-mentioned, raises the amount of money in bank, available to the state, in the redemption of the first series of bonds payable on the 1st of July next, to seven hundred and ninety-seven thousand and fifty-two dollars.

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The attorney general further shows that the balance of the profit and loss account, which is at present, and probably on the 1st of July next will be not less than four hundred and sixty-eight thousand dollars, after paying the semi-annual dividend is unjustly detained; that a reserve of two hundred and fifty thousand dollars is as much as prudence and caution can require to meet any deficiency which may happen. He therefore prays that the board may be ordered to divide the surplus, that two hundred and eighteen thousand dollars may be immediately divided, and the half thereof one hundred and nine thousand placed to the credit of the state, which will make the sum due to the state in bank and available for the payment of the bonds, nine hundred and six thousand dollars and fifty-two cents.

The bank opposed the exception of *res judicata* to so much of the petition as alleges the illegality of the resolutions of the board, incorporated in the contract for the sale of the bonds of the state, the highest court of justice of this state having adjudged to be otherwise in a suit between the parties to the present.

To that part of the petition which requires a division of the alleged profits on the sale of the state bonds, the bank opposed the exception of prematurity on the ground that the relief prayed for cannot be granted until bonds of the state to the amount of four hundred thousand dollars have been redeemed, as until then no part of said alleged profits can be divided.

To such part of the petition as demands payment of the amount of the sinking fund therein referred to and claims interest, the bank urged as an exception; that it is not responsible for the amount of said fund, which is under the exclusive control and administration of commissioners desig-

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nated by the charter, and the bank is only liable to the commissioners for the surplus of dividends, coming to the state after payment of the semi-annual interest accruing on the bonds of the state.

The bank prayed for the abatement and erasure of the parts of the petition excepted to; and insisting on such exceptions,

The bank answered that it denied all and every allegation in the petition, not therein after especially admitted.

Under these protestations the bank said, that true it is that bonds of the state to the amount of two million four hundred thousand dollars were issued and delivered to the bank as is set forth in the petition, and negociated and sold as is there stated, but under the guarantee and for the account of the bank on the terms and conditions mentioned; and the authority and right of the board to pass certain resolutions which were incorporated in the contract entered into with the purchasers of the bonds, has been recognized and adjudged to be legal in a suit between the state and the bank.

That since the decision of the Supreme Court in said suit, nearly all the shares in the capital of said bank have been sold, aliened and transfered to persons who acquired them with the knowledge and under the faith of said decision and accordingly paid therefor at a higher rate than they otherwise would have done; that if a division of the pretended profits resulting from the sale of the bonds could, at any time have been justly been made, and if the then stockholders were alone entitled to participate therein, which the bank denied, the division should have been made by the directors, under whose administration the sale was effected, and such directors were alone responsible for the misapplication of such supposed profits; that the petition of the state is premature, and the relief sought cannot be granted, because until the payment by the state of all the bonds to the amount of six hundred thousand dollars, no portion of the profits can be divided; and that the state has no right of action. That the bank is not responsible for the management of the sinking fund which is placed by the charter un-

der the exclusive control and management of commissioners, one of whom is the Treasurer of the State; that the amount in it could at any time have been withdrawn from the bank by the commissioners, and was ever subject to their order, and the bank is not responsible for any interest prior to the 9th of February 1831, when by an arrangement with the commissioners, the bank agreed to allow five per cent.; that the directors have, in compliance, at stated periods, made a division of such parts of the profits of the bank as to them appeared advisable, and no other or greater dividend could have been made by them, with a due regard to the interest of the stockholders, and the terms of the contract under which the sale of the bonds took place; that they acted in good faith, and used sound discretion in the discharge of their trust, under the charter which constitutes them sole judges of the portion of the profits which it is advisable to divide.

The District Court decreed that the sum of three hundred and fifty thousand dollars of the profits made by the bank on the sale of the bonds be divided among the stockholders in the proportion in which the dividend was made in July 1825, viz: two hundred one thousand and twelve dollars 86 cents, to be set a part and paid into the sinking fund on the portion thereof coming to the state, and eight thousand nine hundred forty-nine dollars and fourteen cents, be divided among the other stockholders, and that, in addition to any ordinary dividend at the usual period, viz: in August next, the directors divide and apportion among the stockholders the sum of one hundred thousand dollars out of the surplus fund, so that the portion thereof be available to the commissioners of the sinking fund on the 1st day of July next; and that the bank pay costs.

From this judgment both parties appealed.

The exception of *res judicata* which the counsel of the bank urges as resulting from the judgment of this court in a suit between the parties to the present in 1827, appears to us of very little avail. All that was then decided is, that the clause in the contract for the sale of the bonds which provi-

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ded for the retention by the bank of the profits on the bonds, as a security for the purchasers, for the payment of four hundred thousand dollars of the bonds of the first series, ought to have its effect. We cannot see on what ground it may be urged that this measure was illegal. The bonds were the absolute property of the bank; the board had the management of all the affairs of the corporation, and the charter has made it their duty to sell the bonds and imposed no other restriction on them, in the sale except the obligation to sell for specie, and for no less a sum than that for which they had been given to the bank.

The District Court in our opinion did not err in overruling this exception and in deciding that the approaching maturity of the bonds of the first series which will become payable in less than a week had removed the obstacle which the contract had created to the immediate division of the profits among those who are entitled to receive them; and that the state might justly claim a decree directing that the share to which the state was entitled in those profits should be an available fund to be applied towards the discharge of the bonds, to secure the payment of which the whole profits were retained.

Such a decree, instead of being in opposition to that of this court in the year 1827, would be ancillary thereto; and instead of violating the contract with the purchasers of the bonds, would enforce its execution. And this is an answer also to the objection that the suit is premature.

I. On the merits the case presents two very important questions for solution. 1st. What is the sum to which the state will be entitled on the 1st July?

All the property of a bank, after payment of its debts and expenses, is the exclusive property of its stockholders for the time being.

All the property of a bank after the payment of its debts, *deducto ære alieno*, is the exclusive property of its stockholders for the time being, no one else can have any right thereto. It is indeed burdened with a sort of servitude, the obligation of keeping the capital in its original integrity, and of applying it to the object for which it was created.

If the state has any right on the property of a bank, it

must be in consequence of some clause in its charter, unless perhaps the right of taxation.

The ownership of shares in the capital gives to the state precisely the same right which it gives to other stockholders and no more.

The profits of a bank are divisible among all the stockholders, except so much thereof as the board may deem it advisable to reserve for the purpose of preserving the integrity of the stock, and to meet accidents or contingencies which might jeopardize this integrity.

We know of no difference or distinction between the ordinary profits of a bank made by discount and exchange, and those that may result from any other operation.

Strictly speaking, ownership is the right of a natural person or persons only. Artificial persons may hold property for a particular purpose, but *de facto*, this property is really that of the natural persons who compose the corporation; with the exception of such corporations, the members of which are mere trustees, as the regents of an university; the trustees of a college or hospital; in such a case the property holden by the corporation does not belong to the natural persons who compose it, but is owned by the public.

If these premises be true and we believe them incontestible, the profits made by the sale of the bonds, belonged to the bank, or in other words, to the then existing stockholders, in the proportion which the number of shares subscribed for and paid in by each of them respectively, bore to the total number of shares then subscribed for and paid in.

The total amount of shares subscribed for and paid in on the day of the sale, being one hundred and thirty-eight thousand eight hundred and forty dollars, and that paid by the state, two million dollars, it follows that the state is to participate in these profits, in the proportion which the latter sum bears to the former.

The profits are stated on the books of the bank, at three hundred and twenty-one thousand eight hundred and twenty-two dollars and twenty-five cents, which is the balance left, after deducting from the sum received from the purchaser, after deducting charges and two millions of dollars the sum

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The ownership of shares in the capital stock of a bank by the state gives to it precisely the same right which it gives to other stockholders and no more.

The profits of a bank are divisible among the stockholders except so much thereof as in the discretion of the board of directors, is necessary for the safety of the bank, and for the purpose of preserving its integrity.

Ownership is the right of natural persons; but a corporation, as a bank, which is an artificial person may hold property for a particular purpose, which is *de facto* the property of the real person composing it.

The net profits arising from the sale of the state bonds, by the bank of Louisiana in 1824, belong exclusively to the stockholders at the time, in proportion to the stock held and actually paid in by them respectively.

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for which the bonds were given to the bank. This sum we cannot however consider as the nett profits of an operation, by which the bank assumed a very considerable burthen. For it undertook at its risk and expense to transmit and distribute in London the interest accruing on the bonds; this interest being paid by the state in New-Orleans.

It appears that the charges attending the transmission and distribution of this interest, cost to the bank a yearly sum of nine thousand dollars on an average, making for the ten years preceding the maturity of the bonds of the first series, a sum of ninety thousand dollars. At the same rate the costs during the fifteen following years will be an aggregate sum of seventy thousand dollars, in all one hundred and sixty thousand dollars.

Had not the board been prevented by a clause in the contract from an immediate division of the profits, their real amount might have been ascertained by deducting the actual *quantum* of burthen to its cost, and deducting it from the former sum.

But the contract preventing the then existing stockholders from receiving during ten years their shares of the profits, imposed on them a burthen, and by giving to the bank the use of these profits during that period, conferred on it an advantage which the board could not honestly have consented to, without intending to afford them a proper remuneration.

The burthen imposed on the bank by the contract was a sum of one hundred and sixty thousand dollars, payable by irregular annual instalments, during twenty-five years; this the bank has paid or is bound to pay; but the bank has, under a clause of the contract, had the use of a sum the property of the original stockholders, which at the lowest rate of interest has brought a yearly sum of sixteen thousand dollars, from which, deducting the yearly charges for remittances and distribution of nine thousand dollars, there remains a yearly sum of seven thousand dollars, which at the maturity of the bonds of the first series will make that of seventy thousand dollars, the aggregate amount of the costs and expenses of remittances and distribution of interest, during the fifteen following years to the maturity of the bonds of the last series.

It is but justice to the able and honest citizens who composed the board of directors at the end of 1824, to conclude, that in their opinion the advantage resulting to the bank from the retention of the gross profits during ten years was a fair equivalent for the burthen which the contract had imposed on the bank, and that they believed and every subsequent board has believed, that the sum of three hundred and twenty-one thousand eight hundred and twenty-two dollars and twenty-five cents, is the net profit on the sale of the bonds, unaffected by the charges and risk of remittances and distributions, for which the original subscribers have given a sufficient compensation by the delay of ten years in the enjoyment of their profits

Had the board meant to deprive these stockholders in favor of subsequent ones, during ten years, of the advantages resulting from the employment of a sum of three hundred thousand dollars and upwards, without any equivalent by compensation or otherwise, their negligence to provide a remuneration would have been the *crassa negligentia*, which the law considers as fraud.

In the year 1827, it was urged on the part of the state that the charter had directed them to be paid out of the funds of the bank, and therefore they were to be viewed as a *bonus*, which the state had stipulated for; but the argument does not appear to us tenable. These charges were not necessarily to be incurred, they were the result of a contract entered into by the bank and must be borne by those who reaped the profits resulting from it.

We conclude that the share of the state in these profits is three hundred thousand nine hundred and thirty-one dollars.

II. The next question relates to the interest which the state claims on the sum in the sinking fund, previous to an arrangement between the commissioners of that fund, and the board in 1831, by which the latter agreed to pay an interest of five per cent. on the sums the state had in that fund. We think with the district court, that the law does not authorise the court to give it.

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The law does not authorise interest to be allowed on the share of profits belonging to a portion of the stockholders which is retained among the funds of the bank for a series of years.

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The legislature has expressly forbidden courts of justice to allow interest on their judgments, except in cases in which the law permits them to be stipulated. *Code of Practice*, 553. The restriction is more extensive; it forbids interest except in cases in which the law permits to grant it; *permet de l'accorder*.

It expressly forbids its allowance on unliquidated claims. *C. Pr.* 554.

It permits it to be stipulated on loans of money or other moveable property. *La. Code* 2894; and on sales. *Id.* 2531.

It is allowed without having been stipulated for, in certain sales. *La. Code* 1204.

So it is against a tutor who fails to invest funds of his minor. *La. Code* 241; and on the balance he owes. *Id.* 353 and 1141.

Against a partner who fails to put into the partnership funds which he is bound to bring, or employs partnership money for his private account, *La. Code* 2829; against a defaulting borrower, *Id.* 2893; or a depositary, *Id.* 2919; attorney, 2981; against him who has knowingly received money not due by the payor, through the ignorance or error of the latter, *Id.* 2049; it is allowed to a surety, *Id.* 1936; to an agent, *Id.* 2994; on dower, *Id.* 2326, 53; on the price of land, the sale of which is rescinded, 1864, 72, 2570, 8; on loans on mortgage, without an endorser, acts of 1820, 93; on protested notes, acts of 1821, 44; in certain cases on debts due by a succession, *Code of Practice* 988; on a balance due by an executor or curator, *Id.* 1007.

The present case has been assimilated to that of a partner employing partnership money in his private affairs. It is but the converse of it.

Lastly, the state has complained that the board retains too large a sum as a surplus to meet accidents and contingencies. The sum thus reserved is four hundred and forty-six thousand dollars. Witnesses have been heard, some of whom think this reservation too considerable, while others think otherwise. The district judge has concluded that the board ought to divide a part of this surplus among the stockholders, and has fixed the part of which he thinks ought to be divided at one hundred thousand dollars, and has decreed a division accordingly.

The charter has given the management of the affairs of the bank to the board of directors, and has expressly made it the judge of that portion of the profits, which it is advisable from time to time, to divide among the stockholders; a very strong case should indeed be made to justify a court in any interference with the management of these affairs, and to substitute its own judgment to that of the board, on the *quantum* of the profits which it is proper to divide. If the board honestly err in these matters, we are not ready to say the courts possess the power to rectify its mistakes.

While no improper motive, no partiality is suggested, the remedy may be left to be applied by the stockholders, who at each annual election, have it in their power to change their agents.

The district judge informs us, that the bank of the United States retains a surplus fund of three millions, which is something less than one-tenth part of its capital. The bank of Louisiana it appears retains a little more than that in proportion to its capital. The difference may well be accounted for by the difference which exists between the customers of these two institutions. That of the first are all mercantile men; one half of those of the other are agriculturists. The one acts on notes at sixty, ninety and one hundred and twenty days at most; while a great proportion of the funds of the other, are lent on mortgages and paid by small annual instalments. These circumstances render the call for relief on customers much more precarious in the bank of Louisiana.

It is ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, and proceeding to give such a judgment as in our opinion ought to have been given below; it is ordered, adjudged and decreed, that the sum of three hundred thousand nine hundred and thirty-one dollars, being the share of the state in the profits made on the sale of the bonds, be on the 1st July next, the day of the maturity of the bonds of the first series, be applied by the bank to the redemption of the said bonds, or be paid over to the commissioners of the sinking fund, to be by them so applied; and that the bank pay costs.

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The board of directors of a bank is invested with discretionary power of judging what portion of the profits it is advisable from time to time to divide among the stockholders:

A very strong case must be made to require a court of justice to interfere with the discretion of the directors in relation to the *quantum* of profits of the bank which they are to divide.

If the directors honestly err in exercising their discretion in managing the funds of a bank, it is not clear that courts possess the power to correct their mistakes.

Note.—There were *five cases* decided, and in which opinions were delivered during the time embraced by this volume, but which were suspended by applications for a re-hearing until near the close of the summer term, which have been omitted; the volume having already greatly exceeded seven hundred pages, the quantity required by law. These cases will appear at the beginning of the next volume.

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In the matter of Percy vs. Millaudon et als. 584
18. If an appeal bond was null at the time the appeal was brought up, it cannot be made valid afterwards by filling up the blanks. *ib.*

AGENT—See *Principal and Agent*.APPEAL.—*Verdict and Judgment sustained.*

1. A cause will not be remanded on the ground of error in the charge of the judge as to the defendant's responsibility, if on the trial it did not appear that the plaintiff had taken the steps necessary to fix that responsibility..... *Oneto vs. Delauny et al.* 32

2. Where a cause, depending mainly on matters of fact, had been submitted to five juries, and three verdicts had been given for the plaintiff, and the two other juries were unable to agree, and on appeal the cause was remanded for a new trial, and a fourth verdict was afterwards had for the plaintiff on the second appeal, the Supreme Court refused to set aside the verdict..... *Myers vs. Slack* 136

3. Where a contrariety in names of the heirs and persons giving a power of attorney to recover the estate for them, in that capacity, is reconciled by satisfactory testimony, received in the court below without objection, the Supreme Court will not disturb the judgment.

Heirs, &c. of Pacquett vs. Mossy et al. 157

4. The verdict of a jury on a question of fact unless clearly contrary to evidence will not be disturbed.

Orleans Navigation Company vs. Allard et als. 485

5. In a case where there is much testimony introduced on both sides and a motion for a new trial, although the judgment of the District Court appears clearly correct, the Supreme Court will not in such a case, affirm it with damages for a frivolous appeal..... *Keller vs. Banks* 527

6. In an action on a notarial instrument, executed by the defendant to a third party to raise a mortgage when he had surrendered up the debt for which the mortgage was given, but in which he acknowledges the receipt of the money; after a lapse of twenty-three years before suit, a jury may well infer from this great length of time, corroborated by circumstantial proof that the debt never existed, or has been paid, and their verdict for the defendant will not be disturbed. *Goddard's heirs vs. Urguhart* 659

7. Where there is no question of law raised, and the case is simply one of fact, and the enquiry is, whether the evidence supports the judgment, which on a close examination does not show that the judgment is erroneous, it will be affirmed with costs. *Soulie, Curator, &c. vs. Azereto.* 677

APPEAL.—*Cause Remanded.*

1. A cause will be remanded, if on the trial in the inferior court, the evidence adduced was so confused that the Supreme Court cannot reconcile it with the verdict..... *Harrison vs. Faulk.* 80

2. In cases where the evidence, in any manner supports the verdict of the jury, the Supreme Court will not disturb the verdict, as founded on matters of fact, but the cause will be remanded, when the Supreme Court cannot fully concur in the conclusion of the jury.

Martin vs. Newton et al. 286

3. When the Supreme Court are not satisfied with the verdict of the jury, and judgment thereon, after an examination of the evidence, the cause will be remanded for a new trial..... *Marigny vs. Perret et al.* 695

4. Where one of several defendants made no answer and no judgment by default taken against him, although there was a general verdict and judgment for the defendants, he will not be considered as before the court, and the judgment as to him will not be disturbed, in remanding the case for a new trial..... *ib.*

APPEAL.—*Judgment Reversed.*

1. An appeal will not be dismissed on the ground that the judgment of the inferior court was rendered in favor of a different party plaintiff, from that stated in the petition..... *Hagan vs. Ferres.* 225

2. But where both parties pray for a reversal of the judgment, it will be done; as to affirm 'it, would be granting something to the parties *ultra petitione.*..... *ib.*

APPEAL.—*And Judgment affirmed with Damages.*

1. Where a person is sued on an obligation and admits it, but pleads a deduction of the price of the object for which it was given, and fails to produce any evidence in support of his plea, and appeals, the appeal will be considered as taken for delay, and the judgment will be affirmed with ten per cent. damages, and costs. *Wilson, Curator, &c. vs. Proctor.* 523

2. Where the appellant makes no effort to sustain his appeal. and no reason appears from the evidence to hope for success, the judgment will be affirmed, and damages allowed as for a frivolous appeal.
Caffin vs. Pandelly. 640

ATTORNEY.

1. A power of attorney to collect a debt, and to do all acts necessary to effect the collection, does not authorise the agent or attorney to transfer the claim to his principal. in order to protect the transferee from the consequences of a suretyship..... *Tezada vs. Beaman* 84

ATTORNEY AT LAW.

1. The authority to collect a note, necessarily implies the power to extinguish the right of the creditor in it; and whether the payment by which this extinction is produced, be made by the debtor or any other person, is a matter of no importance, provided, that the attorney expressly stipulates, that the transfer is made without recourse to his client.
Sprigg vs. Beaman. 59

2. An attorney at law whose name does not appear on the record, and who has not been employed in the suit by the party, although he had previously been engaged in a case remotely connected with it, has no

authority to receive money from the marshal on account of such party. On the attorney's authority being disavowed, the marshal will be responsible for the re-payment of the money.....*Lambeth vs. The Mayor et als.* 731

ATTORNEY OF ABSENT HEIRS.

1. The attorney of the absent heirs is the proper person to represent them in all cases where they are interested. even after the executor or curator of the estate is discharged.....*Dupre vs. Reggio, Tutrix, &c.* 653

2. The attorney of absent heirs does not become *functus officio* by the discharge of the testamentary executor..... *ib.*

BANK.

1. All the property of a bank after payment of its debts and expenses, is the exclusive property of its stockholders for the time being.
State of Louisiana vs. Bank of Louisiana. 745

2. The ownership of shares in the capital stock of a bank by the state gives it precisely the same right which it gives to other stockholders, and no more..... *ib.*

3. The profits of a bank are divisible among all the stockholders except so much thereof as in the discretion of the directors, is necessary for the safety of the bank, and for the purpose of preserving its integrity. *ib.*

4. Ownership is the right of natural persons; but a corporation, as a bank, which is an artificial person may hold property for a particular purpose, which is *de facto* the property of the real persons composing it.... *ib.*

5. The net profits arising from the sale of the state bonds by the bank of Louisiana in 1824, belong exclusively to the stockholders at the time, in proportion to the stock held and actually paid in by them respectively. *ib.*

6. The law does not authorise interest to be allowed on the share of profits belonging to a portion of the stockholders, which is retained among the funds of the bank for a series of years..... *ib.*

BANK DIRECTORS.

1. A person who believes himself agrieved, by the refusal of the board of directors of a bank, to permit him to become a stockholder, may, whatever be the value of the property offered, resort to an action for damages; but he cannot *appeal* from such a refusal to a court of original jurisdiction.....*Walden vs. Union Bank.* 248

2. In such a case damages cannot be recovered for an honest error or mistake, but they may be for capricious or improper conduct of the board..... *ib.*

3. When the minds of the board of directors, to whom is submitted the validity of titles of property offered in mortgage, are not perfectly satisfied, their duty to the corporation requires them to withhold the expression of their satisfaction..... *ib.*

4. The board of directors of a bank is invested with discretionary power of judging what portion of the profits it is advisable from time to time to divide among the stockholders. *State of Louisiana vs. Bank of Louisiana.* 745

5. A very strong case must be made to require a court of justice to interfere with the discretion of the directors in relation to the *quantum* of profits of the bank which they are to divide..... *ib.*

6. If the directors honestly err in exercising their discretion in managing the funds of the bank, it is not clear that courts possess the power to correct their mistakes..... *ib.*

BILL OF LADING.

1. The bill of lading is only *prima facie* evidence that the goods and merchandise mentioned in it were shipped in good order.

Kimball and Lilly vs. Brander et als. 711

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. It is a legal presumption, which may be rebutted, that a bill of exchange is accepted on the existence of funds belonging to the drawer, in the hands of the acceptor or that the latter is indebted to the former.

Clogg et als. vs. Alexander. 356

2. In an action by the acceptor, against the drawer of an accommodation bill of exchange, proof must be made of the hand writing of the drawer that the bill was put in circulation after acceptance, and payment was made to a person authorised to demand it..... *ib.*

3. An action by the acceptor against the endorser, cannot be sustained without proof, that the acceptance was made purely for the accommodation of the drawer..... *ib.*

4. A promise by the endorser to pay a bill of exchange, after he was verbally notified of the drawee's refusal to pay it, is a waiver of his right to protest and notice in the usual form..... *Ives vs. Eastin.* 13.

5. Where a suit was brought on a bill of exchange, and the defendant and drawer was not charged in the petition, upon his promise to pay after presentment of the bill to and refusal of payment by the drawee; and where eighteen months before the trial the defendant was apprised that he would be charged on that ground by a deposition which was taken: held that evidence of such promise was admissible, although objected to on the trial..... *ib.*

6. A receipt for a promissory note given by the endorsee to the endorser, stating that on payment of the note the endorsee is to retain a specified sum and to pay the balance to the endorser, does not change the obligation of the endorser, though it is evidence that on payment of the note the endorsee is liable to the endorser for that balance.

McCarty vs. Montet. 20

BILLS OF EXCEPTION—See *Exception*.

BOUNDARY.

1. A bequest was made of a tract of land "containing ten arpents front with the ordinary depth, to be laid off on the right hand side of bayou bœuf, decending, at a small distance below, Robinett's line at a gully." It was proved there was no gully below R's. line, but there was one five arpents above it. Held as there is no gully below the line, the line must be taken as the boundary, and that the intention of the donor cannot be defeated by such an error as to the situation of the gully.

Brown vs. Frantum. 39

BROKER.

1. Brokers are not employed like commission merchants, to buy or sell, or like bankers to lend or borrow money, but simply to procure sales or loans. They negotiate bargains, carry communications to and from the parties respectively, and they or their agents conclude the bargains..... *Beal vs. M'Kiernan.* 407

2. To justify payment to a broker, the purchaser is bound to show either a general custom or a special authority from the vendor to receive payment..... *Toledano vs. Klingender.* 691

3. In the absence of proof of any authority in a broker to receive payment for the seller, or of any act from which such authority can be presumed, the buyer who pays must sustain the loss, in case the broker fails to pay over the money..... *ib.*

BUYER AND SELLER—See *Vendor and Vendee*.

CERTIFICATE.

1. When a suit is brought in one parish and transferred to another, where it is tried, and where judgment is rendered, the clerk of the court in which the cause originated, cannot, on appeal, certify to the record, *M'Intyre vs. Whiting,* 35

2. Where the record contains no statement of facts, and the certificate of the clerk shows that the testimony taken in open court was not reduced to writing, the case cannot be examined on its merits in the Supreme Court..... *Thomasson vs. Baum,* 123

3. The clerk's certificate that the record contain a full transcript of all the pleadings, proceedings, documents, and evidence on file in the case, does not authorise the conclusion that all the evidence adduced, was put on file, and is, therefore, insufficient..... *Nettleton vs. Stephens,* 164

4. The certificate of the clerk alone, that the record contains a copy of all the documents on file, a transcript of all the proceedings had, and all the testimony adduced, authorises the Supreme Court to examine a case on the merits..... *Ervin et als. vs. Orillion,* 205

5. The clerk's certificate that the record contains a full transcript of all the pleadings, proceedings, documents, and evidence on file in the case, does not authorise the conclusion that all the evidence adduced was put on the file and is, therefore, insufficient,

Anderson et als. vs. Stephens, 301

CITATION.

1. The sickness of the judge *a quo*, cannot excuse the want of citation in due time, it being a writ in the ordinary course of judicial proceedings, requiring no special order of the judge,.. *Plauché et al. vs. Marigny*, 111

2. The citation of the appellee cannot be proved, as a matter *in pais*, it must appear as a matter of record, or at least must be established by the written acknowledgment of the party,..... *ib.*

3. Service of the citation and petition of appeal at the last domicile of the appellee, residing within the State is insufficient; it should have been at is usual residence,..... *Veuve vs. Righter* 138

4. A citation or something equivalent in law, is necessary to the validity of every judgment,..... *Thomas et als. vs. Breedlove et als.*, 573

CODES.

1. The word "rights," in the *La. Code*, art. 2156, embraces every thing included in the following words, "actions, privileges and mortgages,"..... *Sprigg vs. Beaman*, 59

2. The art. 342 of the Code of Practice, is applicable only to courts sitting in the city of New-Orleans,..... *Jarreau vs. Choppin et al.*, 130

3. It is impossible to reconcile satisfactorily the discrepancies of several articles of the code; full effect will be given to the last, in the order of their arrangement,..... *Gilbert vs. his creditors*, 145

4. The articles of the *Louisiana Code*, relative to putting a party in default, do not apply to a claim of damages for an alleged trespass; they relate solely to obligations arising out of contracts,..... *Turner vs- Pully*, 159

5. Article 327, of the *Louisiana Code*, does not relate to a succession, of which a tutor has already, the administration by virtue of his tutorship. It refers to estates which may descend to his wards during their minority,..... *Ervin et als. vs. Orillion*, *ib.*

6. The articles 586 and 596, of the *Code of Practice*, are not absolutely contradictory, and are to be construed so as to give full effect to both,..... 205

7. The 1787th article of the *Civil Code*, has no relation to the opposition on the part of the vendee to carry into effect the adjudication to him of minor's property, ratified by a family meeting subsequently held, on the ground that the bond of the tutor was not given within two days after the adjudication,..... *Cavelierf. w. c. vs. Germain*, 215

8. The words, "must accept" in the 1533d article of the *Louisiana Code*, are not prohibitory so as to import a nullity if contravened, nor is the pain of nullity expressly declared,.....*Duplessis et als. Kennedy*, 231

9. The Louisiana Code has preserved all the principles, which before its promulgation prevented a commission merchant, who had an order to purchase cotton, to apply his own cotton thereto,

Beal vs. M'Kiernan, 407

COLLECTOR.

1. When a collector of the revenue has exacted higher duties than permitted by law, his payment of them after a claim made on him for the excess, does not change his liability for that excess,

Cantzler et als. vs. Gordon, 258

2. If a collector of the revenue insert in the blank bond for duties, signed and left with him, a larger sum than is due the United States, according to the laws of congress, he exceeds his powers as an agent of the United States, and renders himself personally responsible, even although he acted through error,..... *ib.*

COMMISSION MERCHANT.

1. The commission merchant who undertakes to fill an order, with cotton which he has to sell, assumes inconsistent duties,

Beal vs. M'Kiernan, 407

CONFLICT OF LAWS.

2. Bonds or obligations entered into in states where the common law prevails, the right of the parties thereto must be determined by that system of jurisprudence,.....*King vs. Harman's heirs*, 607

1. A mortgage on one third of a certain steam boat was given in Kentucky, to secure the mortgagee residing in this state, for advances made and to be made here for the mortgagor; the mortgage was forwarded to the mortgagee, to whom the boat was consigned, and in whose possession she was when attached. *It was held* that this was an inchoate mortgage, to take effect only on the acceptance of the mortgage, that it is to be governed by the laws of this state, and that not having been duly recorded here, it cannot have effect against the creditors of the mortgagor.

Zacharie et als. vs. O'Beirne et als. 398

CONSIGNOR AND CONSIGNEE.

1. Where the consignee paid the duties in depreciated government paper, on the consignment on joint account, solely at his own risk, and not at the instance and request of the consignor, held that the consignor was entitled to an equal share of the gain, by that mode of payment.

Zacharie vs. Blandin 193

2. The consignee has no privilege on a steam boat for monies which he has advanced on the boat.....*Zacharie et als. vs. O'Beirne et al.* 398

CONTRACT.

1. In case of doubt the contract should be construed strictly against the person contracting,..... *Sorbé et al. vs. Merchants Insurance Company*, 185

2. It is the assent of a party, or that of the person with whom he contracts which gives the contract its binding force. Both parties must be bound, or neither,..... *Cavelier, f. w. c. vs. Germain*, 215

3. Whenever property is acquired by the effect of obligations, those obligations, except such as are created by operation of law, result from the agreement of parties, which is essentially a contract,
Duplessis vs. Kennedy et als. 231

4. Breaches of contracts are either negative or positive, and the latter are not divested of their character on account of their being tortious or even criminal,..... *Keene vs. Lizardi et als.* 315

5. A contract of passage is broken if a cabin passenger be not allowed the cabin, or be compelled to share it with every hand on board; if he be not furnished with food, if he stipulated for it; if his situation be rendered uncomfortable, by any hand being allowed to molest him; and if he do not enjoy on board that ease and comfort for which the passage money is the consideration,..... *ib.*

6. Female passengers further stipulate for a complete exemption from rude, indecent and brutal behaviour towards them,..... *ib.*

7. It was agreed that a certain tract of land belonged to one of the contracting parties, who had given the others a good and valuable consideration for the same, which the others acknowledged to have received. *Held* this is not a contract of sale, there being no price certain and fixed by the parties,..... *Conway vs. Bordier et al.* 346

8. A. directs B. to buy and ship cotton; B. has cotton of his own, and determines to ship it; this creates no agreement, obligation, contract, or sale,..... *Beal vs. M'Kiernan*, 407

9. A. has an order from B., to purchase cotton, and from C. to sell his crop: he determines on selling C's cotton to B. The price has been determined by one person only; there is not that concurrence of two minds, *aggregatio mentium*, which is essential to the formation of the contract,..... *ib.*

10. It is not every error that will invalidate a contract. The error must be in some material point, such as in the motive or consideration, the person with whom it is made, or in the subject matter of the contract,..... *Mayor et als. vs. Blache et als.* 500

11. The voluntary execution of a contract, carries with it a renunciation of all exceptions which the party executing might have set up against it in relation to vices or nullities of form,
Syndic of M'Manus vs. Jewett, 530

12. When it is stipulated between plaintiff and defendant, that the latter is to receive ten per cent. per annum interest on his advances to, and one third of the profits in the mercantile firm of the former, the contract will be declared usurious, and no part of the interest and profits can be recovered,..... *Flower vs. Millaudon*, 697

13. A penal clause in a contract fixing the amount of damages in case of its non-performance by either party is reciprocal, and must be enforced on this principle; and nothing more or less than the penalty fixed can be recovered,..... *M'Gloin vs. Henderson & Johnson*, 720

14. But where a penal clause in a contract fixes the amount of damages in case of non-performance by either party, and there is a part performance by one of them, the court may modify the penalty accordingly,..... *ib.*

15. So where one party advances half the sum stipulated in the performance of a contract, which has a penal clause of one thousand dollars, in case of failure, and the other party fails to complete his part, the former cannot recover back the sum advanced and the penalty too; he can only recover the penalty,..... *ib.*

16. So where the owners of a schooner stipulate to deliver passengers at a particular place for a certain sum, in the penalty of one thousand dollars, and fail without the fault of the other party, the penalty is thereby forfeited and will be recovered, 715

CONTRACT FOR CARRYING THE MAIL.

1. The clause of the act of Congress relating to the obstruction of the passage of the mail, is of a penal character, and in its application to individuals, charged with a violation of it, must be strictly construed; and certainly not with less strictness when it is sought under its provisions to protect from the pursuit of creditors the vessels usually employed in the transportation of the mail, in derogation of a right recognised by the laws of the state..... *Parker vs. Porter et als.* 169

2. It is not enough that in consequence of the seizure, the mail contractor was put to inconvenience in complying with his contract, and that there ensued a delay in the departure of the mail, the seizure itself must be a wilful obstruction..... *ib.*

3. The decision of the Supreme Court in the case of *Parker vs. Porter et als. ante* 160, confirmed..... *Collins et als. vs. Porter et als.* 424

COURT OF PROBATES.

1. The Court of Probates has jurisdiction over a proceeding instituted to compel the defendant to comply with the terms of a sale, ordered by that court..... *Lewis's executors vs. Casenave.* 437

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2. The Court of Probates has no jurisdiction in an action against an executor for damages occasioned by an act of the defendant not legally done, in relation to the administration of the succession.

Hurst vs. Hyde's Executor. 449

CURATOR.

1. A curator ought to render his account before the court without being called on by the heirs, but his omission to do this does not deprive him of the right, when an account is provoked by the heirs, to demand credit for a sum which he is entitled to retain, although he has not claimed it in the course of his administration. *Denaule vs. Nunez.* 27

2. The settlement of an estate, administered by a curator before the Court of Probates, in which settlement the heirs were not properly represented, cannot be considered as *res judicata* against them. If made *ex parte* by the curator, it creates only *prima facie* evidence of the faithfulness of his administration, and correctness of the account rendered..... *Verret et al. vs. Aubert.* 350

3. The applicant for the curatorship of a deceased person, is not entitled to the appointment on the ground that they were both members of the same lodge of Freemasons..... *Holland vs. Wheaton.* 443

4. The payment of the tomb of the deceased, makes the person making it a creditor of the estate, not of the deceased, and does not entitle him to the curatorship..... *ib.*

5. In the term *curator ad hoc*, the word *negotium* is understood; as the word *litem* would be if the term *curator ad hoc* were used.

Hooke vs Hooke et al. 472

6. It is the duty of the plaintiff to bring all the defendants before the court, by provoking the appointment of a curator *ad hoc* to those who reside out of the state.

Lincoln Fearing & Co. vs, Executors of Russell Ball. 685

DEBTOR AND CREDITOR.

1. A debt as between debtor and creditor is indivisible without the consent of both..... *Kelso vs. Beaman.* 87

2. The words "third persons" in the article 3315 of the *Louisiana Code*, include all who may be interested in the pecuniary standing or solvency of the person against whom mortgages exist, and consequently it includes creditors of every description who may have dealt with the mortgaging debtor in good faith, whilst in ignorance of or before the existence of the right claimed by mortgagee creditors.

Gilbert vs. His Creditors. 145

1. An opposing creditor cannot urge a claim in the Supreme Court which was not stated in his opposition in the inferior court.

Zacharie et al. vs. O'Beirne et al. 378

DEFAULT.

1. Where defendant was obligated to deliver certain articles to the plaintiff, and the latter in his letter requested the former to hasten the shipment of the articles, and this letter was on the trial produced by the defendant, held that the latter was thereby put in default.

Spurrier vs Sheldon et al. 182

DEMAND.

1. Personal demand on the debtor, previous to bringing the hypothecary action against the third possessor, will not be required where the debtor has absconded. A return by the sheriff of *nulla bona*, is sufficient.

Sprigg vs. Beaman. 59

2. The fact of the plaintiff's attorney asking the defendant for a settlement of the account between them, is evidence of an amicable demand on the latter.....*Hough, curator, &c. vs. Richards.* 675

3. When it appears there was no allegation or proof of an amicable demand before the inception of the suit, the defendant may, on asking it in his answer to the appeal be allowed his costs in both courts.

Brunel vs. Millaudon. 713

4. Making diligent inquiry for the maker of a note and to find his domicile, but without effect, in order to make demand of payment, will excuse the want of a formal demand.....*Franklin vs. Verbois et als.* 727

5. The act of March 1827, has not introduced any new rule as to the demand necessary to be made on makers of notes or acceptors, or drawers of bills. What will constitute a legal demand of payment so as to bind endorsers must depend on the commercial law..... 73

DEPOSIT.

1. The obligation of a depositary to a third person who is the owner of the thing deposited, can be produced only by the service of legal process.....*Oneto vs. Delauny et al.* 32

2. The responsibility of the depositary extends to third persons when the thing deposited does not belong to the depositor..... 5

DONATION.

1. If the donor alone appear before the notary and sign the act of donation, it is not null for want of form...*Duplessis vs. Kennedy et als.* 231

2. The words "must accept" in the 1533d article of the *Louisiana Code*, are not prohibitory so as to import a nullity if contravened, nor

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is the pain of nullity expressly declared..... 231

3. Any form of expression, which shows that the parties understood each other as to the thing given, and the conditions and charges annexed to the donation, is sufficient..... *ib.*

4. A minor above the age of puberty, may even without the concurrence of a curator, better his condition by accepting a donation..... *ib.*

5. If while the donor stipulates a return to himself, he stipulates it in favor of another at the same time, and yet not in terms importing essentially a substitution, the stipulation of return to himself may subsist, and that part only be declared null, which contravenes the prohibition of the Code..... *ib.*

ENDORSERS.

1. A receipt for a promissory note, given by the endorsee to the endorser, stating that on payment of the note the endorser is to retain a specified sum and to pay the balance to the endorser, does not change the obligation of the endorser, though it is evidence that on payment of the note the endorsee is liable to the endorser for that balance.

McCarty vs. Montet. 20

2. In an action against the drawer and endorser of a promissory note, although the drawer may plead the respite granted him in bar to the suit, this plea has no effect on the liability of the endorser.

Picquet vs. Dimitry. 120

3. The endorsers of notes given to the corporation of New-Orleans, in pursuance of an express agreement, to secure the payment of a deficit discovered to be due by the city treasurer, for whom the endorsers are already sureties for the faithful administration of his office as treasurer, cannot discharge themselves on the ground that said notes were executed in error, because it is alleged they were not bound under their surety bond..... *Mayor et als. vs. Blache et als.* 500

4. Considered as mere endorsers, there is nothing showing why the defendants endorsed the notes in question, and as between the holders and endorsers a plea that they endorsed without consideration would not avail them..... *ib.*

5. The act of March 1827, has not introduced any new rule as to the demand necessary to be made on makers of notes or acceptors, or drawers of bills. What will constitute a legal demand of payment so as to bind endorsers must depend on the commercial law.

Franklin vs. Verbois et als. 728

6. Notice of protest for non-payment by the drawers given to the endorsers by leaving it at their dwelling houses is sufficient..... *ib.*

7. Where the defendant pleads a general denial, and that he was not

party to a suit by which the endorser was released for want of notice, he cannot offer evidence to show the endorser has been secured against his endorsement.....*Miranda vs. City Bank of New-Orleans.* 740

8. It is not to be presumed that the endorser intended to make himself unconditionally liable and waive a demand on the drawer, and protest and notice to himself, because he attended a meeting of the creditors of the drawer, to be secured against his endorsement..... 740

ERROR.

1. In an assignment of errors apparent on the face of the record, nothing can avail the appellant which could have been cured by evidence legally introduced in the inferior court.

Miller vs. Whittier et al. 70

2. While the appellant is by the judgment condemned to pay the exact sum he owes, he cannot assign as error that the plaintiff has also judgment against another person for an equal or less sum..... 70

3. If the appellant, relying on error apparent on the face of the record, fail to assign the order on which he relies within ten days from the filing of the transcript, he cannot do it afterwards, and the appeal will be dismissed.....*Bowman vs. Jones et al.* 143

4. If the appellant rely on errors, apparent on the face of the record, and fail to make the assignment within the ten days next following that of filing the transcript of the record, the appeal will be dismissed.....*Moore vs. Gibson.* 155

5. Clerical errors when they appear merely as such in entering orders, &c. ought not to be allowed to affect the rights of the parties, and should be disregarded.....*Elkins vs. Zacharie.* 646

EVICITION.

1. The same judgment which has been rendered against the possessor of property, for rents accruing after judgment of eviction from the premises will be rendered against his vendor.....*Elliot et al. vs. Labarre.* 166

2. The article 2535 of the *Louisiana Code*, which authorises the buyer who is disquieted or has reason to fear eviction, to withhold the price until security is given, applies to a buyer in possession who has accepted the sale, and not to one who discovers these defects before he accepts a deed from the seller.....*Pontchartrain Rail Road Company vs. Durel.* 481

3. The purchaser of property at sheriffs or marshals sales is entitled to the sum which he really paid and which must be reimbursed in case of eviction, the consideration having thereby absolutely failed.

Lambeth vs. The Mayor et als. 731

4. Where a purchaser at a marshal's sale is afterwards evicted on the ground that the property was not legally sold, the only injury he sustains is the amount which he paid for the property..... *ib.*

5. Seizing creditors of property sold under execution are responsible to the purchaser no further than for the re-imbursement of the purchase money..... *ib.*

EVIDENCE.

1. When two parties are applicants for the purchase of a tract of land from the United States, and the Register permits one of them to purchase, his title under such a permission will not be disturbed, although the evidence does not satisfactorily prove the decision between them to have been made by a comparison of the proof of their respective pretensions.

Primot vs. Thibodaux, 10

2. Where a suit was brought on a bill of exchange, and the defendant and drawer was not charged in the petition, upon his promise to pay after presentment of the bill to and refusal of payment by the drawee; and where eighteen months before the trial, the defendant was apprised that he would be charged on that ground, by a deposition which was taken: held that evidence of such promise was admissible, although objected to on the trial..... *Ives vs. Eastin,* 13

3. A judgment record is admissible in evidence to prove a judgment against the defendant, rendered in another state, on which judgment the suit is instituted; although the plaintiff knows the existence of another record, showing the defendant to have taken the benefit of the insolvent laws of that state and that the plaintiff was one of his assignees.

McIntyre vs. Whiting, 35

4. Testimonial evidence to prove the age of a person is admissible, unless it is first shown that there exists a record of births, or other written evidence..... *Duplessis vs. Kennedy et als.* 231

5. Parol testimony is admissible in contradiction to a written instrument, to prove facts which are merely inductive to the main facts required to be proved..... *Badon vs. Badon,* 255

6. The discontinuance of a suit is not conclusive evidence of a want of a cause of action, and that a sequestration was wrongfully sued out, particularly as relates to the surety in the bond. In a suit on the bond after a discontinuance, evidence may be given, that some cause of action existed at least in mitigation of damages..... *Stetson et al vs. Le Blanc et al.* 266

7. In an action for work and labor performed under a contract, the plaintiff reciting in his petition an order or draft, not negotiable, drawn in his favor by the defendant on a third person, and the defendant denying due diligence in the presentation of the draft, and claiming a discharge on that ground: held that the draft was not to be considered as a com-

mercial bill of exchange, but was merely an indication of a settlement between the parties, showing the amount really due on the contract, and for this purpose it was admissible in evidence... *Benson et al. vs. Allison.* 364

8. In sums over five hundred dollars, the testimony of one witness is sufficient to confirm a judgment by default..... *Hagan vs. Ferres.* 325

9. A receipt given by the widow to a purchaser of property held in community between her and her children, is admissible in evidence to show payment of the price, against the latter in a suit to recover back the property as having been illegally sold..... *Huet's Heirs vs. Lefebvre.* 601

10. The sheriff's deed and return upon the execution are *prima facie* evidence of title in the purchaser at sheriff's sale; and he who seeks to annul such an alienation must show that the formalities required by law were not complied with..... *Grant and Olden vs. Walden.* 623

11. The bill of lading is only *prima facie* evidence that the goods and merchandise mentioned in it were shipped in good order.

12. Other evidence will be received to show that the articles mentioned in a bill of lading as being shipped in good order, were damaged before shipment..... *Kimball and Lilly vs. Brander et als.* 711

EXCEPTIONS.

1. Where bills of exception have been taken by both parties, and where all the evidence objected to might have been admitted without materially changing the facts; the Supreme Court will not examine the correctness of the decision of the judge *a quo* upon any of the bills of exception..... *Robinson et al. vs. Taylor et als.* 393

2. Payment is a peremptory exception going to extinguish the action and must be pleaded..... *Gleisses vs. Faurie et al.* 455

3. A bill of exception to the rejection of depositions which are not before the Supreme Court, not specifying the grounds upon which they were rejected, is too vague to be examined in this court.

Holmes vs. Holmes. 463

4. It is too late to present a bill of exception to be signed by the judge after judgment is rendered, although the objection to the decision be made on the trial..... *Peytavin vs. Winter.* 553

5. The objection that illegal testimony was admitted on the trial cannot be made the ground for a new trial when no bill of exception was taken to its admission or opposition thereto..... *ib.*

6. Where no bill of exception is taken or objection made to the admission of evidence on the trial, it is too late to object to it on appeal,

Hough, curator vs. Richards. 675

EXECUTION.

1. The sheriff's deed and return upon the execution are *prima facie* evidence of title in the purchaser at sheriff's sale; and he who seeks to annul such an alienation must show that the formalities required by law were not complied with..... *Grant and Olden vs. Walden.* 623

2. The same *delays and formalities* must be observed in executing writs of seizure and sale against mortgaged property, as are required when property is seized under a writ of *fiery facias*,..... *ib.*

3. So in a sale of immovable property under a writ of seizure and sale issuing on a judgment against third possessors of mortgaged property, three days notice is required to be given, after seizure, and before advertising; otherwise the sale is void and transfers no right in the property to the purchaser..... *ib.*

EXECUTOR.

1. Where seizin is given by the will to the executor, he is authorised to bring an action to recover the possession of any property which may have belonged to the testator at his death.

The executors of Hart vs. Boni f. v. c. 97

2. This right of the executor exists, and the action does not abate where the possessor asserts title in himself, the validity of which title can only be ascertained by trial *ib.*

3. In a suit by the executor to recover the deceased's property, the heirs if interested and present, or if absent, then their representatives, should be made parties to the action..... *ib.*

4. Where three executors were appointed with joint and several powers in relation to the settlement and liquidation, and when that should be effected, they were to account to and place the funds of the estate in the possession of one of their number; held that to carry into effect the intentions of the testator thus expressed, a sale of the property was indispensable..... *Executors of Hart vs. Schmidt, attorney, &c.* 167

5. The 1172d article of the *Louisiana Code*, does not apply to the case of an executor who seeks to distribute the net proceeds of an estate among the heirs. In that case the persons concerned are not to be cited in the manner prescribed in that article, which is restricted to cases in which nothing is sought but the sanction of the Court of Probates to the payment of creditors..... *Millaudon vs. Cajus.* 222

6. The case of an executor called to account by the heirs, has no bearing on that of an executor who seeks to distribute the net proceeds of an estate among the heirs..... *ib.*

7. The presence of a party at and his subscribing the inventory, cannot authorise the executor to consider him as constantly in court and bound

to take notice of any account which the executor may subsequently file, so as to be precluded from contesting any part of it, unless a written opposition be filed within three days..... *ib.*

8. Where the functions of two executors are equal and undivided, each can claim one half only of the commission. *Mon et al. vs. Garnier.* 324

9. The legacy left to a co-executor, is evidence of the testator to remunerate this co-executor for his trouble, by the legacy, instead of the half of the commission he would otherwise have been entitled to..... *ib.*

10. The sale by the executor, of property bequeathed as a specific legacy, is wholly irregular and void,

Psyche vs. Paradol et al. Durel appellant. 366

11. A note found among the papers of a factor at his decease, which had been taken in payment of the price of property sold for his consignor, belongs to the latter, and should be delivered up by the executors, or its proceeds if collected, without being mingled with the estate of the deceased..... *L'Hommedieu vs. Penny's Executors.* 599

12. Executors residing in another state, or representing a testator whose will was opened there, cannot intervene in a suit pending in this state until they cause the will to be made executory here.

Lincoln Fearing & Co. vs. Executors of Russell Ball. 685

FREIGHT AND PASSAGE MONEY.

1. When passengers in a vessel are conveyed to a different port without their consent than that agreed on at the time of sailing, no recovery can be had for the amount of their passage money.

M' Gloin vs. Henderson and Johnson 715

2. So where the owners of a schooner stipulate to deliver passengers at a particular place for a certain sum, in the penalty of one thousand dollars, and fail without the fault of the other party the penalty is thereby forfeited and will be recovered..... *ib.*

HABEAS CORPUS.

1. On an application for the writ of *habeas corpus*, the decision of the judge upon matters of a criminal or political nature, is not examinable in the Supreme Court..... *Hyde et al. vs. Jenkins.* 427

2. The writ of *habeas corpus* may be issued in civil as well as in criminal and political cases..... *ib.*

HEIRS.

1. The settlement of an estate, administered by a curator before the Court of Probates in which settlement the heirs were not properly represented, cannot be considered as *res judicata* against them. If made ex

part by the curator, it creates only *prima facie* evidence of the faithfulness of his administration, and correctness of the account rendered.

Verret et al. vs. Aubert. 350

2. Where it is proved that certain persons, who claim an estate, are the legal heirs of its deceased proprietor, they will be considered his only heirs, unless it is shown that others exist..... *Celis et al. vs. Oriol.* 403

3. Where a register of baptism proves that a child was christened by the name of Francisco Antonio." and a register of burials attests the interment of a person named "Francisco," and no question as to the identity was raised in the inferior court: *It was held* that the person whose death was attempted to be proved, must be considered the one whose death, according to the pleadings, it was important to establish..... *ib.*

4. The article 944 of the *Louisiana Code*, establishes the principle, that the capacity of heirs to inherit depends on the law in force at the time the succession is opened..... *Lange et als. vs. Richoux et als.* 560

5. While a person continues a *statu liber* he is capable of receiving by donation or testament but not by inheritance..... *ib.*

6. The attorney of the absent heirs is the proper person to represent them in all cases where they are interested, even after the executor or curator of the estate is discharged..... *Dupré vs. Reggio, tutrix, &c.* 653

7. The attorney of absent heirs does not become *functus officio* by the discharge of the testamentary executor..... *ib.*

HUSBAND AND WIFE.

1. Where a wife sells land belonging to her paraphernal estate, and in the notarial act of sale, acknowledges the receipt of the money, she cannot afterwards deny that she received it, although she may waive the *actual* receipt..... *Foster vs. Her Husband* 22

2. In such a sale the wife may show that in pursuance of an agreement between herself and her husband, the money was actually paid to her husband, or actually passed through his hands in consequence of a transfer of the land by her vendee, and a subsequent sale..... *ib.*

3. The wife, although separated in bed and board from her husband, cannot, without his consent, give a power of attorney to alienate her real estate; though, without his consent, she may give such power in regard to her personal property..... *Harrison vs. Faulk.* 80

4. The wife cannot oppose the homologation of the proceedings of her husband as an insolvent debtor, unless she is authorised by him, or by the judge on his refusal..... *Tourné vs. His Creditors.* 459

5. The wife cannot vote in the deliberations of creditors, unless her rights have been settled by partition or a judgment..... *ib.*

6. The wife has no action against the husband for property of the community sold by him, before the institution of a suit for separation.. *ib.*

7. A suit instituted against the husband and wife, to compel the latter to renounce all liens and tacit mortgages she may have on certain property in the plaintiff's possession, held under titles derived from her husband, is *sui generis*, novel and not tolerated by law and will be dismissed..... *Miller vs. Foucher and Wife*. 638

8. The surviving husband, not separated in bed and board inherits the estate of his deceased wife, who *died without* leaving descendants, ascendants or collateral relations duly acknowledged, in preference to her natural brother..... *Victor vs. Tagiasco's Executor*. 642

9. The surviving wife is called to the inheritance and preferred to all the natural relations of the husband, and he to all her natural relations except those of the descending line..... *ib.*

INHERITANCE.

1. The article 944 of the *Louisiana Code*, establishes the principle that the capacity of heirs to inherit depends on the law in force at the time the succession is opened..... *Lange et als. vs. Richoux et als.* 560

2. While a person continues a *statu liber*, he is capable of receiving by donation or testament but not by inheritance..... *ib.*

3. The surviving wife is called to the inheritance and preferred to all the natural relations of the husband, and he to all her natural relations except those of the descending line..... *Victor vs. Tagiasco's Executor* 642

INJUNCTION.

1. Where the plaintiff by an order of the Parish Court of the parish and city of New-Orleans, had enjoined the payment of the proceeds of a steam boat, sold by order of the City Court, without making those persons parties, who were interested in opposing the plaintiff's claim: *held* such an injunction was properly dissolved on the intervention of one of the judgment creditors in the City Court.

Robertson vs. Bosque et al. 306

2. Damages will not be given where the appellant can be supposed to have entertained an honest doubt..... *ib.*

INSOLVENT.

1. An insolvent cannot oppose the distribution among his creditors of any sum of money in the syndic's hands, on account of irregularities in the sale of the surrendered property, of over-charge by the syndic, or his omission to charge himself with what he is legally chargeable.

Arcenaux vs. His Creditors. 6

2. If the sale of the insolvent's property has been illegally conducted by the syndic, it can be set aside only by the proper action between the proper parties; and the homologation of the tableau of distribution cannot preclude the insolvent, or affect any right to which the illegality might give rise..... *ib.*

3. Every conveyance of property is null and void, which the creditor takes from his debtor, knowing him to be in insolvent circumstances, and by which the debt is secured and an advantage gained over other creditors..... *Ingham et als. vs. Thomas.* 82

4. A conveyance of property is null when made to a third person by the insolvent's vendor, in consequence of a payment theretofore made by the insolvent to the vendor. The syndic alone is entitled to recover the property which the insolvent has conveyed in fraud of the rights of his creditors..... *ib.*

5. All dealings between persons are presumed to be in good faith which take place while neither of the parties is in failing circumstances.
Gilbert vs. His Creditors. 145

6. Insolvency is never presumed.
Blanchard et al vs. State of Louisiana. 290

7. Where the insolvent and another person were both retail grocers, and the articles were received in small quantities from the insolvent, and such as grocers are in the habit of interchanging for the accommodation of their customers: *held* that such transactions in the usual course of business, are not liable to be annulled as fraudulent under the insolvent law..... *Robbins, Syndic, &c. vs. Leverich et al.* 340

8. A transfer is fraudulent, made by an insolvent one week before his surrender of debts due him, so as to secure or novate a debt of the insolvent to the transferee..... *ib.*

9. A sale made to one *not a creditor*, by an insolvent or absconding debtor, even within the three months preceding his failure, is not presumed to be fraudulent; and in an action to annul it, the burthen of proof is on the party attacking the contract.
Syndic of M^r Manus vs. Jewett. 530

10. A partnership claim put on the bilan is not notice to an individual partner whose claim is omitted, and he is not a party to, or bound by the proceedings..... *Thomas et als. vs. Breedlove et als.* 573

11. A creditor who is not put on the bilan for his individual claim and cited to attend the *concurso* of creditors, is not bound by their proceedings, even if he is placed on the tableau of distribution, but declines receiving dividends..... *ib.*

12. The proceedings of a debtor against his creditors are *res inter alios acta* as to any one who is not on the bilan, and whose claim is not mentioned therein..... *ib.*

INSURANCE.

1. This case presents a question of fact, only.

Guillaume vs. The Louisiana Insurance Company. 117

2. To *ship goods at a place*, means to put them on board of a vessel at the place designated, but to *ship goods from a place* does not necessarily imply that they should be laden at the place from which they are to be shipped. The word *ship* may signify either the putting on board of a vessel, or the carrying merchandise on a voyage between two *termini*.

Sorbe et al. vs. Merchant's Insurance Company. 185

3. In a policy of insurance of certain merchandise *to be shipped from a given place* within a specified period, the material circumstance which ought to weigh most, is the time of the sailing of the vessel on which the property is laden; and this could take place so as to bind the insurer at any time within the specified period..... *ib.*

INTEREST.

1. The *Code of Practice* fixes the period when interest commences by the death of a debtor, but indicates no period when it ceases; the interest must, therefore, be considered as a legal accessory, accompanying and supported by the principal until payment..... *Andrews vs. Withers' Heirs.* 360

2. Interest will be allowed on protested notes, and on those given for the price of slaves purchased, from the time they are due and payable.

Franklin vs. Verbois et als. 727

3. The law does not authorise interest to be allowed on the share of profits belonging to a portion of the stockholders, which is retained among the funds of the bank for a series of years.

State of Louisiana vs. Bank of Louisiana. 745

4. In an action against the administrator of a succession founded on a claim for the interest stipulated in the intestate's obligation, legal interest will be added, as upon other claims against the estate.

Mudd vs Stille's heirs. 17

5. A real tender cannot be made so as to stop interest, unless the legal formalities are pursued: thus a tender to the plaintiff's attorney at law, is insufficient..... *ib.*

INTERVENTION.

1. A petition of intervention in a suit, will not be admitted after the trial of the cause has commenced.

Lincoln Fearing & Co. vs. Executors of Russell Ball. 685

2. Executors residing in another state, or representing a testator whose will was opened there, cannot intervene in a suit pending in this state, until they cause the will to be made executory here..... *ib.*

JUDGES.

1. The act of 1824, relating to the trial of causes in which the judges are recused, impliedly repeals the thirtieth section of the act of 1813, which directed the transfer of a cause which the district judge was incapacitated to try, to the court of a neighboring district.

Jarreau vs. Choppin et al. 130

2. The first section of the act of 1824, in which the legislature order certain causes to be tried by the parish judge, repeals the first section of the act of 1822, amending the several acts to organise the courts..... *ib.*

3. Where a parish judge is legally called on to try a cause in the district court, he is a district judge *ad hoc*, and exercises the powers of a district court..... *ib.*

JUDGMENT.

1. No amendment by the judge *a quo*, of a judgment, can be made after the judgment has been signed; nor before, except for the causes enumerated in the 547th article of the *Code of Practice*.

Flint, Syndic, &c. vs. Cuny et al. 67

2. When the judge *a quo* amends a final judgment, after signing it, and appeal be taken from that amended judgment, the Supreme Court is not authorised to examine the first judgment..... *ib.*

3. In such a case, the effect of such a judgment is suspended, and does not resume its legal character till after the reversal of the second judgment. *ib.*

4. If the correctness of a judgment be questioned, and the Supreme Court are not furnished with the evidence on which it was rendered, it will be presumed to have been rendered on evidence which authorised it.

Miller vs. Whittier et al. 70

5. A judgment of the inferior court cannot be altered against a party who is not before the Supreme Court..... *ib.*

6. Where a judgment is taken by default, and afterwards confirmed, the right of mortgage grows out of the final judgment, and does not revert to the date of the judgment by default..... *Ingham et als. vs. Thomas.* 82

7. Although a party is precluded from attacking a judgment on the ground of fraud or nullity, after the lapse of one year, yet where the petition sets up payments and matters arising since the judgment complained of, they will be inquired into..... *Stafford vs. Smith* 91

8. The same judgment which has been rendered against the possessor of property, for rents accruing after judgment of eviction from the premises, will be rendered against his vendor.

Executors of Hart vs. Schmidt, Attorney, &c. 166

9. The validity of a judgment, not reversed or appealed from, cannot be collaterally examined by either of the parties.

Psyche vs. Paradol et al. Durel, Appellant. 366

10. In sums over five hundred dollars, the testimony of one witness is insufficient to confirm a judgment by default.....*Hagan vs. Ferres*. 525
11. In such cases there will be judgment of non-suit for the defendant. *ib.*
12. Where in an action of trespass the jury pronounces on the plaintiff's title, this part of the verdict may be disregarded and judgment rendered on the claim for damages.....*Peytavin vs. Winter*. 553
13. The correctness of the judgment of the Court of Probates cannot be questioned in the District Court.....*Dupré vs. Reggio, tutrix, &c.* 653
14. If an absolute judgment be rendered when the petition prays only for a conditional one, it is good ground for reversal.. *Sprigg vs. Beaman*. 59

JURISDICTION.

1. A court of ordinary jurisdiction, is the proper tribunal in which to enforce the payment of debts due to a succession.
Grub's Heirs vs. Henderson. 51
2. The lessor has a right, under the acts of March 3d 1819, to sue for the recovery of the possession of his leased property, under the jurisdiction of a justice of the peace.....*Richardson vs. Scott & Hook* 54
3. And if judgment is obtained, and possession in pursuance of it, the inquiry will not be allowed, whether or not the proper formalities were complied with in obtaining judgment, if the justice had jurisdiction *ratione materie*..... *ib.*
4. The Supreme Court can entertain jurisdiction of a cause only where the matter in dispute exceeds three hundred dollars
Hagler vs. Pargoud et al. 86
5. The act of 1825, giving the District Court jurisdiction of *all* suits for the partition or sale of any property lying within its limits, does not deprive the Court of Probates of its jurisdiction, in a case where the property to be divided is owned by co-heirs, some of whom are minors residing out of the state..... *Hooke vs. Hooke et als.* 420
6. In a controversy between two persons making claim to an office, when it is shown that it is worth more than three hundred dollars a year, the Supreme Court has appellate jurisdiction of the case.
Hubert vs. Auvray. 595

JURY.

1. The jury are not bound by the opinion of the Supreme Court in estimating the *quantum* of damages in a case.....*Peytavin vs. Winter*. 553
2. The Supreme Court will not interfere in a point of fact on which a country jury are presumed to be better judges..... *ib.*

JUSTICE OF THE PEACE.

1. The proceedings before a justice of the peace to oust a possessor of the contested premises, is evidence in a possessory action to regain possession, *i. e.* to establish *rem ipsam*.....*Richardson vs. Scott et al* 54
2. The lessor has a right under the acts of March 3d 1819, to sue for the recovery of the possession of his leased property, under the jurisdiction of a justice of the peace *ib.*

LAW.

1. The general repealing law of 1828, applies only to the Roman Civil Law, and the Spanish laws in force in the country at the time of the passage of that act, leaving the provisions of our own legislative acts still in force.....*Lewis' Executor vs. Casnave* 437.
2. An exception in the repealing clause of that act in favor of a particular chapter of the old *Civil Code*, shows clearly the intention of the legislature to repeal all other parts of it..... *ib.*

LEASE.

1. The lessor has a right, under the acts of March 3d 1819, to sue for the recovery of the possession of his leased property, under the jurisdiction of a justice of the peace.....*Richardson vs. Scott et al* 54
2. Where a tenant, on being required to surrender his lease, to evade his landlord, put another in possession, such an act is directly *in fraudem legis*, and the possessor is considered as without any right or claim to the possession..... *ib.*
3. If the lessee by express stipulation in the contract of lease, be prohibited from transferring the lease to a third person without the lessor's written consent, this restriction does not apply in case of the assignment by the lessee's executor, and the executor may transfer the lease even against the lessor's will.....*Barron vs. Duncan, executor et al.* 100

LEGACY.

1. Where the heirs of a testator require a title in that quality to property in consequence of a right existing in their ancestor at the time of his death, and which right he had made the subject of a legacy, the title so acquired accrues to the benefit of the legatee.....*Brown vs. Frantum* 39
2. Where the husband died worth five thousand dollars, having bequeathed to his widow a slave and child, and the heirs having abandoned to her the household furniture: held she was entitled to the marital portion.....*Melancon's Widow vs. His executors et als.* 105
3. An universal legacy bequeathed to the concubine of the testator, cannot exceed in amount the one tenth part of the movables and immovables of the estate of the testator.....*Lowery vs. Kline.* 380

4. The sale of property bequeathed made by a universal legatee, is liable to be attacked, though the sale was in good faith, if a reduction of the legacy be afterwards decreed..... *ib.*

MANDAMUS.

1. If a person claiming the right to hold an office under the corporation of New-Orleans, applies to the mayor for his commission and it is refused, his remedy is by writ of *mandamus*..... *Hubert vs. Auvray*, 595

MANDATE.

1. A mandatary under a special power must confine himself strictly within the limits assigned to him, and those dealing with him must at their peril see that he does not exceed his authority; but they need not in search of his powers and their limitations, look beyond the instrument of mandate..... *Brown vs. Frantum*, 39

MARITAL PORTION.

1. When the husband died worth five thousand dollars, having bequeathed to his widow a slave and child, and the heirs having abandoned to her the household furniture: held she was entitled to the marital portion..... *Melançon's Widow vs. His Executors et als* 105
2. legacy made by the husband to his wife, must be deducted from the amount of the marital portion, to which she may be entitled..... *ib.*

MARRIAGE.

1. Marriage is regarded in no other light than a civil contract highly favored,..... *Holmes vs. Holmes*, 462
2. The *Louisiana Code* does not declare null a marriage not preceded by a license, and not evidenced by an act signed by a certain number of witnesses and the parties; nor does it make such an act exclusive evidence of a marriage. These laws relating to forms and ceremonies, are directory to those alone who are authorised to celebrate marriages..... *ib.*
3. Marriage may be proved by any species of evidence not prohibited by law, which does not presuppose a higher species of evidence in the power of the party. Cohabitation as man and wife furnishes presumptive evidence of a preceding marriage..... *ib.*

MARSHALS—See *Sheriffs*.

MINORS

1. During the lifetime of both father and mother tutorship is unknown to the law. Minor children are then subjected exclusively to the authority of the father, who administers the property of his minor children as usufructuary, and is bound to protect them in their persons and rights. The courts of justice cannot deprive the father of any part of his authority at the suggestion of creditors, under the pretext of guarding the interests of the children.

State of Louisiana vs. The Judge of the Parish of Orleans, 363

2. The appointment of a tutor *ad hoc* presupposes that the minor is unprovided with a tutor..... *ib.*
3. Neither the old *Civil Code*, nor the 11th law of the 2d title of the 3d Partida, authorised the appointment of a curator *ad hoc*, to represent a minor under the age of puberty. *Psyche vs. Paradol et als. Durel appellant.* 366
4. If minors after coming of age, either expressly or tacitly approve of the alienation of their property while under age, they cannot sue for its recovery..... *Huset's Heirs vs. Lefebvre et als.* 601

MORTGAGES.

1. The article 3323 of the *Louisiana Code*, implies that the mortgages valid against the creditors may be given if they be executed at a time when the debtor is not in failing circumstances. *Gilbert vs. His Creditors.* 514
2. A mortgage given and inscribed at any time previous to the three month's immediately preceding the failure of a debtor, will not be presumed fraudulent..... *ib.*
3. Where the record does not show by evidence the length of time which elapsed between the inscription of a mortgage and the failure of the mortgagor, it must be viewed as having been made at a period not suspicious. *ib.*
4. Where a mortgage is reserved upon the undivided moiety of a certain tract of land, a subsequent partition does not alter the nature and effects of the contract of mortgage..... *Erwin et als. vs. Orillion.* 205
5. If a mortgage exists on property in the hands of a third possessor, the property can be legally sold under it only by pursuing the hypothecary action..... *Joyce vs. Poydras De La Lande.* 277
6. The sale of property by order of the Court of Probates, extinguishes all mortgages by the deceased..... *ib.*
7. A mortgage on one third of a certain steam boat was given in Kentucky to secure the mortgagee, residing in this state, for advances made and to be made here for the mortgagor; the mortgage was forwarded to the mortgagee, to whom the boat was consigned, and in whose possession she was when attached. *It was held* that this was an inchoate mortgage, to take effect only on the acceptance of the mortgagee, that it is to be governed by the laws of this state, and that not having been duly recorded here, it cannot have effect against the creditors of the mortgagor. *Zacharie et als. vs. O'Beirne et al.* 396
8. Subsequent mortgagees can successfully make many objections to the extinguishment of their mortgages, or the release of them by the sheriff, when a sale at the instance of the first mortgagee leaves nothing for them..... *Gasquet et al. vs. Dimitry.* 453
9. A prior mortgagee who requires the court to order the sheriff to re-

lease the subsequent mortgages, cannot be heard, unless he has made them parties, or given them notice..... *ib.*

NATURAL CHILDREN.

1. So proof of co-habitation with the mother as sole concubine is tantamount to an acknowledgment of paternity.. *Lange et als. vs. Richoux et als.* 560

2. The 221st article of the *Louisiana Code*, provides that the acknowledgment of an illegitimate child by the father shall be made before a notary and two witnesses, when not made in the registry of birth or baptism..... *ib.*

3. But illegitimate children not legally acknowledged, may be allowed to prove the paternal descent if they are free and white..... *ib.*

4. In regard to the mother, illegitimate children of every description, may make proof of their maternal descent, if she is not a married woman. *ib.*

5. According to the Spanish law in force in this state before the adoption of the *Civil Code* in 1808, proof of birth was equivalent to the acknowledgment on the part of the mother, of natural children,..... *ib.*

NOTICE.

1. A duly recorded sale of a tract of land, by a description, applicable only to another tract, conveys *per se* no notice to a subsequent *bona fide* purchaser,..... *Robeson vs. Roberts.* 1

2. Although between the parties, the error in such a sale might be corrected, it can be regarded with respect to third persons, in no other light than a sale of other property,..... *ib.*

3. The 5th section of the act creating the office of register of conveyances, requiring all acts of transfer of immoveable property and slaves, whether passed before a notary or otherwise, to be registered, or to have no effect against third persons but from the day of registry, does not apply to purchasers *without notice*; and operates in favor of such creditors of the vendor as have a *recorded judgment*. or an attachment *levied* before registry,..... *Syndic of McManus vs. Jewett.* 530

4. The registry of an act of sale in the office of the register of conveyances, before any proceedings are had against the purchaser, or notice to him of the claims of the creditors of the vendor, renders the sale valid, although not made until after a sequestration issues against the property,..... *ib.*

5. Where public notice was given of the dissolution of a partnership and the endorsement of the name of the firm appeared to be made afterwards on the note in suit which was purchased through the agency of a broker: *held* that the presumption of notice to the plaintiff is in favor of the defendant, and that the former was bound to *show* that he came within the exception, by being a customer entitled to particular notice.

Nott & Co. vs. Douming et als. 680

6. Public notice of the dissolution of a partnership is good as to strangers, but not in relation to customers, or others previously dealing with the firm; they are entitled to particular notice..... *ib.*

7. Before notice of the dissolution of a partnership to the holder of the partnership endorsement, notice of protest to a member of the firm, is notice to all the partners..... *Nott & Co. vs. Douming et als.* 684

8. The endorsement of a note which is negotiated is equivalent to drawing a new bill; and when the endorsement is made in the name of the firm, until notification of its dissolution to the holder of the note, he has a right to regard the firm as still in existence, as to the demand and notice of protest..... *ib.*

9. Notice of protest for non-payment by the drawer given to the endorsers, by leaving it at their dwelling houses, is sufficient.

Franklin vs. Verbois et als. 727

10. A bank or other agent, undertaking to collect a note or bill endorsed is bound to use the same diligence, in giving notice of protest and demand of payment of the drawer to the endorser as the holder, and is liable to the holder on failure..... *Miranda vs. City Bank of New-Orleans.* 740

11. The bank is responsible for the acts of the notary, in not giving due notice of protest to the endorser; and the *onus* rests upon it as agent, to show that no damage resulted from such neglect, in order to be relieved from its liability..... *ib.*

12. Where a bank or agent receives a note or bill for collection, and fails to give notice, and on suit being brought against the endorser, he is exonerated for want of notice of protest, the bank cannot excuse itself on the ground that it was not made a party to the suit, unless it can show that sufficient legal notice was given to the endorser..... *ib.*

13. Notice to an endorser residing in New-Orleans, put in the post-office, without showing the notary was ignorant of his domicil, or used due diligence to find it, is insufficient to bind the endorser..... *ib.*

OFFICE.

1. In a controversy between two persons making claim to an office, when it is shown that it is worth more than three hundred dollars a year, the Supreme Court has appellate jurisdiction of the case.

Hubert vs. Aweray. 595

2. A writ of *quo warranto* is not the remedy to procure a commission from the mayor, which is withheld..... *ib.*

3. If a person claiming the right to hold an office under the corporation of New-Orleans, applies to the mayor for his commission and it is refused his remedy is by writ of *mandamus*..... *ib.*

ONUS PROBANDI.

1. A sale made to one *not a creditor* by an insolvent or absconding debtor, even within the three months preceding his failure, is not presumed to be fraudulent, and in an action to annul it, the burthen of proof is on the party attacking the contract.

OPPOSITION.

The word "opposition" in the *Louisiana Code*, art. 2926, refers only to opposition through and by the authority of a court.

Oneto vs. Delaunoy et al. 32

PARAPHERNAL PROPERTY.

If the sale of paraphernal property be made on a credit, the wife's right of mortgage attaches only from the date of the receipt of the money and for the amount received..... *Foster vs. Her Husband.* 22

PARTIES.

1. A will cannot be annulled, or its validity inquired into, without making those having an interest arising under it, parties to the suit.

Grubb's Heirs vs. Henderson. 51

2. In a suit between the heirs of an estate and the executor, the court cannot decree certain notes, found in the succession, but payable to the testator's natural children, to be the property of the plaintiff, without making the payees of the notes parties to the suit..... *ib.*

PARTITION.

1. Owners of undivided parts of an estate, have at all times the right of requiring a partition, and no exception exists in regard to minors.

Hooke vs. Hooke et al. 472

2. Proceedings in suits for partition, are now conducted according to the rules prescribed by the *Code of Practice* and the *Acts of the Legislature*, since the great repealing act of 1828..... *ib.*

3. A partition will neither be confirmed or annulled without all the parties to it being before the court..... *Lange et als. vs. Richoux et als.* 560

PARTNERSHIP.

1. Where a partnership, as to a single transaction, exists between two commercial firms, in an action by one firm for a settlement as to that transaction, it is not necessary to make all the members of the other firm defendants; especially where some of them do not reside within the jurisdiction of the court..... *Zacharie vs. Blandin.* 193

2. In such a copartnership the actual amount only which one of the firms may have paid on the merchandise owned in partnership, for duties

in foreign port, will be allowed to the firm paying it; and the court will not inquire whether that amount was expended in bribing the custom house officers of the port where the duties were paid..... *ib.*

3. A common interest in personal property, to be sold on joint account, constitutes a commercial partnership for the particular adventure; and any act fairly and honestly done, by one member of such partnership, is binding on the other..... *Hagan et als. vs. Fowler.* 311

4. A partner is a competent witness for his co-partner in suit for the recovery of the price of work which was done before the partnership was formed, and when he has no interest in the result of the suit.

Kellar vs. Banks, 527

5. The objection to a partner as a witness for his co-partner in a matter which took place before the existence of the partnership, goes to his credibility and not to his competency..... *ib.*

1. After the dissolution of a commercial firm, a partner cannot bind the co-partners by endorsement..... *Nott & Co. vs. Downing et als.* 680

6. Public notice of the dissolution of a partnership is good as to strangers, but not in relation to customers or others previously dealing with the firm; they are entitled to particular notice..... *ib.*

7. When public notice was given of the dissolution of a partnership and the endorsement of the name of the firm, appeared to be made afterwards on the note in suit which was purchased through the agency of a broker; held that the presumption of notice to the plaintiff is in favor of the defendant, and that the former was bound to show that he came within the exception, by being a customer entitled to particular notice. *ib.*

8. Before notice of the dissolution of a partnership to the holder of the partnership endorsement, notice of protest to a member of the firm is notice to all partners..... *Nott & Co. vs. Downing et als.* 684

9. In a suit for the liquidation and settlement of partnership transactions and accounts, all the partners of a firm must be made parties either as plaintiffs or defendants.

Lincoln Fearing & Co. vs. Executors of Russell Ball. 685

10. And where all the partners of several firms are prayed to be made parties to a suit for the liquidation and payment of the partnership concerns, and some of them reside out of the state and no representative is appointed, those who do appear may dismiss the suit for want of all the parties before the court..... *ib.*

11. Where a third person stipulates with a commercial firm, to advance a certain sum in cash or by endorsement for its support and credit, on which he is to be allowed ten per cent. interest per annum, and one third of the profits for a term of years, at the end of which this sum is to be re-imbursed, he will not be considered as a partner, but as having made a loan to the firm..... *Flower vs. Millaudon.* 697

PAYMENT.

1. In such an action, where part of a claim was barred by prescription, and there was evidence of a partial payment made upon the claim; held the amount paid must be imputed upon that part of the claim which is prescribed..... *Salnave vs. M' Donough's executors.* 357
2. Payment is a peremptory exception going to extinguish the action, and must be pleaded..... *Gleisses vs. Faurie et al.* 455

PENALTY.—See *Contract*.

PETITION-

1. Where the petition claims section No. 27, and the evidence shows that the land occupied by the defendant, is No. 28, the plaintiff will be precluded under the pleadings, from showing title to No. 28, and a judgment of nonsuit entered..... *Hall vs. Marshall.* 49
2. The circumstance of the defendant setting up title to sections 27 and 28, in his answer, will not authorise testimony to prove title to land not claimed in the petition..... : *ib.*
3. In an action on an obligation to deliver a certain quantity of cotton, where the plaintiff in an amended petition, alleged a promise made after the obligation had fallen due, to pay the amount in money; held proof of putting the defendant *in mora* is unnecessary, and that plaintiff was entitled to recover on proof of the subsequent promise as alleged.
Roe vs. Richardson et al. 78
4. If advantage of the want of an allegation in the plaintiff's petition of putting the defendant in delay, be not taken by way of exception, proof of the putting in delay is admissible on the trial, and it is too late for the defendant to oppose its introduction..... *Harrison vs. Faulk.* 80
5. In an action of trespass for damages to the plaintiff's land, in which the petition alleges ownership and possession, and contains a prayer for general relief, the jury are excluded from an examination of the plaintiff's title..... *Petayvin vs. Winter.* 553

PLEADINGS.

1. When a suit was brought on a bill of exchange, and the defendant and drawer was not charged in the petition, upon his promise to pay after presentment of the bill to and refusal of payment by the drawee; and where eighteen months before the trial the defendant was apprised that he would be charged on that ground, by a deposition which was taken: held that evidence of such promise was admissible, although objected to on the trial..... *Ives vs. Eastin.* 13
2. A general allegation of a party being indebted in a gross sum, without any specification of the time, place or manner, in which the claim accrued, is too vague, to authorise the admission of proof in support of it.
Pagoud vs. Guice, administer, &c. 75

3. Although a party is precluded from attacking a judgment on the ground of fraud or nullity, after the lapse of one year, yet where the petition sets up payments and matters arising since the judgment complained of, they will be inquired into..... *Stafford vs. Smith*. 91

4. A receipt of a payment given since the institution of suit, and not claimed in an amended petition, will not, if objected to, be admitted in evidence, to prove the allegation of payment made in the petition, praying to enjoin further proceedings in an execution on other grounds *ib.*

5. When a general denial is pleaded to an action against the defendant as the drawer of a promissory note annexed, and made part of the petition, any variation between the name of the drawer as signed to the note and the defendant's name as described in the petition may be reconciled by parol testimony..... *Anselm vs. Braud*. 140

6. In action for work and labor performed under a contract, the plaintiff reciting in his petition an order or draft not negotiable, drawn in his favor by the defendant on a third person, and the defendant denying due diligence in the presentation of the draft, and claiming a discharge on that ground; held that the draft was not to be considered as a commercial bill of exchange, but was merely an indication of a settlement between the parties, showing the amount really due on the contract, and for this purpose it was admissible in evidence. *Benson et al. vs. Allison*. 304

7. Where a register of baptism proves that child was christened by the name of "Francisco Antonio," and a register of burials attests the interment of a person named "Francisco," and no question as to the identity was raised in the inferior court: *It was held* that the person whose death was attempted to be proved, must be considered the one whose death, according to the pleadings it was important to establish.

Celis et al. vs. Oriol et al. 403

POSSESSOR.

1. *It seems* that the article 2290 of the *Louisiana Code*, applies to cases in which the possessor was from the first a wrong doer and an usurper, acting with a knowledge of his want of faith. It cannot be said that the purchaser at the marshal's sale participated with the latter in the original trespass, by seizing and selling property without authority.

Joyce vs. Poydras de la Lande. 277

2. The possessor who was originally in good faith, is not liable for the destruction of the thing without his fraud or fault..... *ib.*

3. Such a possessor is responsible for the fruits and revenues of the thing from the time he receives it until the time of its destruction..... *ib.*

PRACTICE.

1. If an absolute judgment be rendered when the petition prays only for a conditional one, it is good ground for reversal. *Sprigg vs. Beaman*. 59

2. No amendment by the judge *a quo*, of a judgment, can be made after the judgment has been signed, nor before, except for the causes enumerated in the 547th article of the *Code of Practice*.

Flint, syndic, etc. vs. Cuny et al. 67

3. When the judge *a quo* amends a final judgment after signing it, and appeal be taken from that amended judgment, the Supreme Court is not authorised to examine the first judgment..... *ib.*

4. If the advantage of the want of an allegation in the plaintiff's petition of putting the defendant in delay be not taken by way of exception, proof of putting in delay is admissible on the trial, and it is too late for the defendant to oppose its introduction..... *Harrison vs. Faulk.* 80

5. The request of one of the parties can alone authorise the testimony to be taken in writing by the clerk..... *Bowman vs. Janes.* 124

6. If the parties disagree as to the statement of facts, where the testimony has been taken in writing by the clerk, at the request of one of the parties, the judge is bound to make a statement of facts, and he has no right to avoid the obligation which the law imposes on him, by directing, *ex officio*, the testimony to be taken in writing by the clerk..... *ib.*

7. It is not sufficient to object generally, that the evidence is not the best; it must be shown, either from the nature of the fact to be proved, or otherwise that there is better evidence behind in the power of the party.

Duplessis vs. Kenedy et als. 231

8. When the judgment of the inferior court was not given on the question of fact, contested by the pleadings, and this is not complained of by the parties, the Supreme Court will not examine the correctness of the decision of the judge *a quo*, rejecting the depositions of a witness..... *ib.*

9. In a redhibitory action where the plaintiff in his petition, in order to prove the warranty of the slave, relies on a sale passed on a particular day, and identifies it by referring to it as annexed to an answer in a particular case in the same court: *held* that by the introduction in evidence of the act of sale, the defendant could not complain of surprise, although by the petition he alleges the payment to have been made by an endorsed note, and the act of sale shows it to have been made in cash.

Compton vs. Woolfolk. 273

10. In such a case the judgment rendered could be pleaded in bar to a subsequent action for the same cause..... *ib.*

11. The Supreme Court cannot give judgment against a warrantor cited in the cause, who has not answered, and against whom judgment by default has not been taken..... *Conway vs. Bordier et al.* 346

12. The validity of a judgment not reversed or appealed from, cannot be collaterally examined by either of the parties.

Psyche vs. Paradol et al. Durel appellant. 366

13. After the argument has commenced, new evidence cannot be introduced, except by consent of parties; but cases may occur in which the court might allow it under particular circumstances, and in the exercise of a sound discretion..... *ib.*

14. Where it was clear from the testimony of the case that a road was not made in conformity to law; but it had been examined and received by the persons duly authorized for that purpose; it was held that its original structure could not be inquired into.

Orleans Navigation Company vs. Allard et als. 485

15. In an action of trespass for damages to the plaintiff's land, in which the petition alleges ownership and possession, and contains a prayer for general relief, the jury are excluded from an examination of the plaintiff's title..... *Peytavin vs. Winter.* 553

16. Where in an action of trespass the jury pronounces on the plaintiff's title, this part of the verdict may be disregarded and judgment rendered on the claim for damages..... *ib.*

17. And where all the partners of several firms are prayed to be made parties to a suit for the liquidation and payment of the partnership concerns, and some of them reside out of the state and no representative is appointed, those who do appear may dismiss the suit for want of all the parties before the court.

Lincoln Fearing & Co. vs. Executors of Russell Ball. 685

18. It is the duty of the plaintiff to bring all the defendants before the court, by provoking the appointment of a curator *ad hoc* to those who reside out of the state..... *ib.*

19. The proceedings of the creditors of the drawer of a note, at which the endorser attended in relation to his endorsement, are not admissible in evidence by the bank in a suit by the holder of the note against it, for failing to give notice to the endorser by which he was released, to show he has been indemnified, especially when this matter is not pleaded, and because it is between persons not parties to the present suit.

Miranda vs. City Bank of New-Orleans. 740

20. Where the defendant pleads a general denial, and that he was not party to a suit by which the endorser was released for want of notice, he cannot offer evidence, to show the endorser has been secured against his endorsement..... *ib.*

PRESCRIPTION.

1. The prescription of one year applies to an action instituted to correct a former judgment, which it is alleged is erroneous, and some of the items composing it fraudulently charged; and if such an action be brought more than a year after the judgment, proof must be given that the fraud has been discovered within a year..... *Stafford vs. Smith.* 91

2. The prescription of four years relating to actions of minors against their tutors, is only applicable to accounts rendered by tutors. It relates to acts of a tutor, such as he may do in pursuance of his official power or authority, and such as would be ratified when legally done. The sale of property made as belonging to the seller, is not an act of this kind.

Commagere vs. Gally et al. 161

3 In an action for the balance due on account, the prescription of three years, for the hire of movables or immovables, is applicable.

Salnave vs. McDonough's Executor. 357

4. In such an action, where part of a claim was barred by prescription, and there was evidence of a partial payment made upon the claim: *held* the amount paid must be imputed upon that part of the claim which is prescribed..... *ib.*

5. The clause of the article 3499 of the *Louisiana Code*, which provides that actions of workmen, laborers, and servants for the payment of their wages, shall be prescribed in one year, does not apply to an action for work done under a specific contract or by the job.

Morrison vs. Leeds. 591

6. The prescription under the Spanish law, of debts on simple contracts resulting from chirography or private instruments of writing is ten years..... *Goddard's heirs vs. Urquhart.* 659

7- The *Civil Code* of 1808, article 65, page 486 which provides that *all actions, &c.* are prescribed after thirty years, does not repeal the previous law which prescribes personal actions, debts on simple contracts, &c. after a lapse of ten years..... *ib.*

8. Under the *Louisiana Code* the prescription of personal actions and debts evidenced by chirography instruments, is twenty years against persons residing out of the state..... *ib.*

9. Where the law is changed after prescription begins to run, the time elapsed under the law preceding the alteration is to be computed according to that law, and that which follows is to be reckoned according to the new law; and the time acquired under the old law is to be added to that acquired under the new law, in the proportion that each time bears to the term required by the old and new laws..... *ib.*

10. So in a personal action in which the prescription under the Spanish law is ten years, and nine years and seven months having expired, and only five months wanting at the promulgation of the *Louisiana Code* in 1825, which changed the prescription of personal actions as running against absentees to twenty years: *held* that ten months is required under the new law to complete the prescription..... *ib.*

PRESUMPTION.

1. On a question as to a debt claimed by the curator against the estate which he administers, founded on a receipt of the intestate given to a

third party for an amount equal to that claimed for the curator's account: held that the decision of the judge of the domicile of the parties, who was acquainted with them, their character, circumstances, &c., must have great weight..... *Denaule vs. Nunez.* 27

2. The lapse of a number of years though less than is sufficient for prescription, may afford a presumption of the payment of the debt, which if supported by others may amount to full proof..... *ib.*

3. Cotton in the possession of a certain person, shipped by him, and marked with the initials of his name, must be presumed to be his property. *Robinson et al. vs. Taylor et als* 393

4. The presumption created by the 2568th article of the *Louisiana Code*, regards vices of body solely..... *Lewis' Executor vs. Casenave.* 437

PRINCIPAL AND AGENT.

1. The agent, like the principal, may buy from any person not prohibited by law, but neither can buy from himself..... *Beal vs. McKiernan.* 407

2. A directs B to buy and ship cotton; B has cotton of his own, and determines to ship it. This creates no agreement, obligation, contract, or sale..... *ib.*

3. If the City Treasurer under a resolution of the city council employs a book-keeper, and puts it in his power to withdraw money from the treasury without the warrant of the Mayor, and to disguise his peculations by false entries and fraudulent accounts, instead of being a mere book-keeper, he becomes the confidential agent of the Treasurer who is liable for his mis-conduct..... *Mayor et als. vs. Blache et als,* 500

4. When an agent has charge of a vessel of his principal with a general authority to procure a cargo of goods suitable for a particular market, and draws and negotiates a bill of exchange to raise funds for this object, the principal will be bound to pay it, although the agent had no special power to this effect..... *Perrotin vs. Cucullu.* 587

5. Even without a specific power the agent can bind his principal by drawing bills and signing notes, when it is necessary to raise funds to carry into effect the main object of the agency..... *ib.*

6. Where a mercantile firm is part owner of a steamboat and acts as the agent of a co-proprietor at a distance to insure his interest therein, and afterwards discontinues such insurance without any instructions from him, and the boat is lost, the firm is liable for the amount of such interest uninsured..... *Berthoud vs. Gordon, Forstall & Co.* 579

7. And the circumstance that the firm rendered an account current to the co-proprietor before the loss of the boat in which the charge of the premium for insurance is omitted and no objection made, will not be considered as notice of a discontinuance of the agency to insure so as to excuse the party from his liability..... *ib.*



8. A bank or other agent, undertaking to collect a note or bill endorsed is bound to use the same diligence, in giving notice of protest and demand of payment of the drawer to the endorser as the holder, and is liable to the holder on failure.... *Miranda vs. City Bank of New-Orleans.* 740

9. The bank is responsible for the acts of the notary, in not giving due notice of protest to the endorser; and the *onus* rests upon it as agent, to show that no damage resulted from such neglect, in order to be relieved from its liability..... *ib.*

10. Where a bank or agent receives a note or bill for collection, and fails to give notice, and on suit being brought against the endorser, he is exonerated for want of notice of protest, the bank cannot excuse itself on the ground that it was not made a party to the suit, unless it can show that sufficient legal notice was given to the endorser..... *ib.*

PRISON BOUNDS.

1. Where a debtor is imprisoned on a judgment and execution exclusively in the name of the plaintiff, although others may have an interest therein; and after having given bond for the prison limits, the plaintiff in execution gives him a written "*consent as far as he is interested,*" to "absent himself for ten days," of which the debtor avails himself and leaves the prison limits without consulting the other persons interested, the surety in the prison bond is thereby discharged..... *Elkins vs. Zacharie* 646

2. The plaintiff in execution for whose benefit the prison bond is taken, is the only person who can control its conditions, and his consent that the debtor be absent only for ten days, forever discharges the surety.... *ib.*

PRIVILEGE.

1. The consignee has no privilege on a steamboat for monies which he has advanced on the boat..... *Zacharie et al. vs. O'Beirne et al.* 398

PROMISE.

1. A promise by the drawer to pay a bill of exchange after he was verbally notified of the drawee's refusal to pay it, is a waiver of his right to protest and notice in the usual form..... *Ives vs. Eastin.* 13

2. Where a suit was brought on a bill of exchange, and the defendant and drawer was not charged in the petition, upon his promise to pay after presentment of the bill to and refusal of payment by the drawee; and where eighteen months before the trial, the defendant was apprised that he would be charged on that ground, by a deposition which was taken: *held* that evidence of such promise was admissible, although objected to on the trial..... *ib.*

PROMISSORY NOTES—See *Bills of Exchange, &c.*

PURCHASER—See *Vendor and Vendee.*

RECUSATION.

1. The act of 1824, relating to the trial of causes in which the judges are recused, impliedly repeals the 30th section of the act of 1813, which directed the transfer of a cause which the district judge was incapacitated to try, to the court of a neighboring district.... *Jarreau vs. Choppin et al.* 130
2. The law of 1822, as to the trial of causes, cannot be resorted to, to prevent a delay of justice, in those cases to which the act of 1824 is inapplicable..... *ib.*
3. The judge before whom the case originated, and he whom the law calls in his place, being both incapacitated from acting, is a *casus omissus*, and is remediable by the legislature only..... *ib.*

REGISTER OF CONVEYANCES.

1. The 5th section of the act creating the office of register of conveyances, requiring all acts of transfer of immovable property and slaves, whether passed before a notary or otherwise, to be registered, or to have no effect against third persons but from the day of registry, does not apply to purchasers *without notice*; and operates in favor of such creditors of the vendor as have a *recorded* judgment, or an attachment *levied* before registry..... *Syndic of M^e Manus vs. Jewett.* 530
2. The registry of an act of sale in the office of the register of conveyances, before any proceedings are had against the purchaser, or notice to him of the claims of the creditors of the vendors, renders the sale valid, although not made until after a sequestration issues against the property. *ib.*

SALE.

1. A duly recorded sale of a tract of land, by a description applicable only to another tract, conveys *per se* no notice to a subsequent *bona fide* purchaser..... *Robeson vs. Robert.* 1
2. Although between the parties, the error in such a sale might be corrected, it can be regarded with respect to third persons, in no other light than a sale of other property..... *ib.*
3. Where a wife sells land belonging to her paraphernal estate, and in the notarial act of sale, acknowledges the receipt of the money, she cannot afterwards deny that she received it although she may waive the *actual receipt*..... *Foster vs. Her Husband.* 22
4. A vendor, having acknowledged the receipt of the price, may allege that he never touched it, but that it passed *eo instanti* into the hands of a third person, for his use and benefit..... *ib.*
5. In such a sale the wife may show that in pursuance of an agreement between herself and her husband, the money was actually paid to her husband, or actually passed through his hands in consequence of a transfer of the land by her vendee, and a subsequent sale..... *ib.*

6. If the sale of paraphernal property be made on a credit, the wife's right of mortgage attaches only from the date of the receipt of the money, and for the amount received..... *ib.*
7. The right acquired by each of two purchasers of the same tract of land from the same vendor, the title of either of whom requires for its validity as to third persons, only a due registry before the other, it is a subject of sale or legacy..... *Brown vs. Frantum.* 30
8. A and B verbally agreed that one might sell any part of the other's land, and the other was bound to approve the location. A had sold a certain quantity of B's land, and it was held that B might bequeath the same quantity of A's land..... *ib.*
9. A verbal agreement for land or slaves is not null and void; its defect relates solely to the proof; and if one of the parties acknowledge the agreement, or permits parol evidence of it to be given without opposition, the agreement will be carried into effect..... *ib.*
10. Every conveyance of property is null and void which the creditor takes from his debtor, knowing him to be in insolvent circumstances, and by which the debt is secured and advantage gained over other creditors. *Ingham et als. vs. Thomas.* 82
11. A conveyance of property is null when made to a third person by the insolvent's vendor, in consequence of a payment theretofore made by the insolvent to the vendor. The syndic alone is entitled to recover the property which the insolvent has conveyed in fraud of the rights of his creditors..... *ib.*
12. Where a slave is adjudicated at auction on a credit, and the vendee refuses to comply with the terms of sale; in the action brought against him the plaintiff should claim a compliance with these conditions or immediate payment; but in such a case, if the plaintiff demands an absolute judgment for immediate payment, the prayer for general relief will enable the Supreme Court to examine the case on its merits. *Gottschalk vs. De La Rosa.* 219
13. In an action to rescind the sale of a slave, on account of his running away, proof that he ran away three times before the sale, without proof of the period the slave was absent at either time, is sufficient to support the claim. *Hiligsberg vs. New-Orleans Canal and Banking Co. et al.* 228
14. A sale of mortgaged property by the sheriff under execution, does not extinguish the legal mortgage; *a fortiori*, the levying of an attachment on it cannot. *P. Blanchard's widow et als. vs. F. Blanchard et al: the State intervenor.* 295
15. The sale by the executor of property bequeathed as a special legacy, is wholly irregular and void. *Psyche vs. Paradol et al. Durel, appellant.* 366

16. The sale of property bequeathed, made by a universal legatee, is liable to be attacked, though the sale was in good faith, if a reduction of the legacy is afterwards decreed..... *Lowery vs. Kline*. 380

17. Where the vendor sells property at public auction *without title* to even a small part of it, the vendee to whom the adjudication is made, cannot be required to complete the sale and accept security.
Pontchartrain Rail Road Company vs. Durel. 481

18. The purchaser at public auction may object to the nullity of the sale to his vendor when it clearly appears that he has sold the thing of another..... *ib.*

19. In acts of sale and conveyance of immovable property, the sale is not complete until all the parties sign the act; and until *all* have signed, those that first signed may recede..... *Syndic of McManus vs. Jewett*. 530

20. But in a contract of sale signed by the vendor and vendee, in which the price and terms of payment are settled, the stipulation that a third person named in the act, will release a certain mortgage, is a stipulation in favor of the purchaser, is collateral to the contract; and the sale does not depend on that condition, and is valid without the signature of such third person..... *ib.*

21. A third person named in an act of sale, who stipulates therein to release a mortgage on the property sold, may be called as a witness by the vendee to prove that he had released the mortgage as stipulated, although he never signed the act containing this stipulation..... *ib.*

22. A sale made to one *not a creditor*, by an insolvent or absconding debtor, even within the three months preceding his failure, is not presumed to be fraudulent; and in an action to annul it, the burthen of proof is on the party attacking the contract..... *ib.*

23. A sale at auction is complete by the adjudication, but the law requires an act of sale or written evidence of the contract, and the purchaser has a right to require such a conveyance as will truly show what he bought and the conditions of sale.... *Canal Bank et als. vs. Copeland*. 543

24. Where a lot of land is sold in reference to a plan on which it is designated, the plan is regarded as forming part of the description of the land sold..... *ib.*

25. So where land is designated on a plan, which of itself refers to titles in the surveyor's office that will enable the purchaser to run the lines, it is a sufficient description to render the sale binding on him,.... *ib.*

26. A sale at auction is not null because the written instructions of the vendors to the auctioneer are not produced on the trial..... *ib.*

SALE OF MINOR'S PROPERTY.

1. The auctioneer's acceptance of the last bid, on the adjudication of the property of a minor, is the acceptance and sale of the tutor, and if the person acting in that capacity has not given security, there is no legal acceptance of the bid..... *Cavelier, f. w. c. vs. Germain*, 215

2. The subsequent ratification of a sale made under such circumstances by a family meeting, on the application of the purchaser, might have rendered the adjudication valid, but such a ratification is of no avail when obtained on behalf of the minor..... *ib.*

SEIZURE AND SALE.

1. The same *delays and formalities* must be observed in executing writs of *seizure and sale* against mortgaged property, as are required when property is seized under a writ of *fierifacias*. *Grant and Olden vs. Walden* 623

2. So in a sale of immovable property under a writ of *seizure and sale*, issuing on a judgment against third possessors of mortgaged property *three days* notice is required to be given *after seizure*, and before advertising; otherwise the sale is void and transfers no right in the property to the purchaser..... *ib.*

SEQUESTRATION.

1. Grounds of suspicion, merely, and those extremely light, do not authorise resort to so severe a mode of proceeding as a sequestration, nor ought they to have much influence in varying the standard by which damages should be awarded..... *Stetson et al. vs. Le Blance et al.* 260

2. A party against whose property a writ of sequestration is wrongfully sued out, ought to be placed as nearly as possible, in the situation in which he would have been had the writ not issued. If the party suing out the writ, fail to show not merely a real cause of action, but a ground of suspicion, which would justify a man in the sober pursuit of his rights, uninfluenced by momentary pique, to resort to a remedy intended only for extreme cases, he will subject himself to pay damages according to a liberal standard, though not vindictive..... *ib.*

3. A sequestration is a judicial deposit, and is essentially a conservatory act, which does not divest the title of the owner, and gives the creditor no greater right than he had before... *Syudic of McManus vs. Jewett*. 530

SHERIFF.

1. Sheriffs, marshals and constables are directly responsible so far as their negligence or want of skill, in the execution of the duties of their offices, cause a *direct* injury, but not for losses remotely consequential and such as grow out of a failure to gain or make profit.

Lambeth vs. The Mayor et als. 731

STATEMENT OF FACTS.

1. Where the record contains no statement of facts, and the certificate of the clerk shows that the testimony taken in open court was not reduced to writing, the case cannot be examined on its merits in the Supreme Court..... *Thomasson vs. Baum.* 121

2. The request of one of the parties can alone authorise the testimony to be taken in writing by the clerk..... *Bozman vs. Jones.* 124

3. If the parties disagree as to a statement of facts, where the testimony has not been taken in writing by the clerk, at the request of one of the parties, the judge is bound to make a statement of facts, and he has no right to avoid the obligation which the law imposes on him, by directing *ex officio*, the testimony to be taken in writing by the clerk..... *ib.*

STIPULATION.

1. So where A stipulates with B to pay C a debt owing to the latter, by B, according to the doctrine of *stipulation pour autrui*, A becomes C's debtor..... *Baldwin vs. Thompson et als.* 474

SUBROGATION.

1. A surety who pays and is subrogated to the rights of the creditor against the principal debtor may legally issue execution in the name of the judgment creditor..... *Sprigg vs. Beaman.* 59

2. In the assignment of a judgment the legal and the express subrogation are of equal extent, and every right which the creditor possessed, passes by the act of payment to him by whom that payment is made. *ib.*

3. Where a person pays a debt for another which he may be legally bound to pay, or have an *interest* in paying, he is thereby subrogated to all the rights of the creditor against the person for whom he has paid.
Baldwin vs. Thompson et. als. 474

4. Where A stipulates with B to pay certain notes given by the latter to C, which are secured by mortgage, and A fails to make payment: *held*, on B's taking up his own notes, he is thereby subrogated to all C's right of mortgage against the property affected, even in the hands of a third possessor..... *ib.*

5. The act of subrogation must be evidenced by an authentic document; i. e. the payment made by the original promissor in the notes, must be shown by a notarial act, to authorise an order of seizure and sale thereon *ib.*

SUBSTITUTION.

1. The principles relating to a substitution, apply equally whether the substitution results from the terms used in creating the donation, or un-

der the disguise of a stipulated return; and if their lurks a real substitution in the condition of return as expressed by the parties, its absolute nullity must be declared..... *Duplessis vs. Kennedy et als.* 231

2. If while the donor stipulates a return to himself, he stipulates it in favor of another at the same time, and yet not in terms importing essentially a substitution, the stipulation of return to himself may subsist, and that part only be declared null, which contravenes the prohibition of the Code..... *ib.*

SUCCESSION.

1. The heir is liable only for his virile share of his ancestor's debt, though an administrator has been appointed, and the acceptance of the succession has been unconditional..... *Mudd vs. Stille's heirs.* 17

2. In an action against the administrator of a succession, founded on a claim for the interest stipulated in the intestate's obligation, legal interest will be added, as upon other claims against the estate..... *ib.*

3. The 984th article of the *Code of Practice*, which requires all unliquidated claims against an estate to be first presented to the administrator before suit is brought, does not require proof or evidence to be produced to him..... *Hamblin vs. Hook, Administratrix.* 73

4. Article 327, of the *Louisiana Code*, does not relate to a succession of which a tutor has already the administration by virtue of his tutorship. It refers to estates which may descend to his wards during their minority. *Erwin et als. vs. Orillion.* 205

5. The tutor can under authority of general administration, collect and sue for, if necessary to such collection, debts due to the succession..... *ib.*

6. When an estate is accepted with the benefit of inventory, and some of the heirs are of full age, while others are minors, it should be left to the administration of the tutor until partition. In suits to recover debts due to the succession, the heirs of full age and the tutor of the minor heirs should concur..... *ib.*

7. The article 1034 to 1040 seem to require the appointment of an administrator in every case where a succession is accepted with benefit of inventory..... *Poulney's Minors vs. Barrett et al.* 493

8. Where a succession is accepted with the benefit of inventory, and some of the heirs are of full age and others are minors, it should be left to the administration of the tutor of the minors until partition..... *ib.*

SURETY.

1. A surety who pays and is subrogated to the rights of the creditor against the principal debtor may legally issue execution in the name of the judgment creditor..... *Sprigg vs. Beaman.* 95

2. The act approved in March 1827, absolutely prohibits any resort to the property of the sureties of the sheriff, until all that of their principal in the parish has been exhausted... *Blanchard et al. vs. State of Louisiana.* 290

3. The sureties on a curator's bond, are not bound in warranty to purchasers of property belonging to the succession administered by him.

Longpre vs. White. 388

4. The responsibilities of sureties in bonds, given to secure the faithful discharge by curators of their duties, renders them liable for misconduct, only to the heirs and creditors of the deceased..... *ib.*

5. The surety is discharged when by the act of the creditor the subrogation of his rights, privileges and mortgages, can no longer be operated in favor of the surety..... *Mayor et als. vs. Blache et als.* 500

6. Where the corporation of New-Orleans released a mortgage in their favor on certain property of the city Treasurer, without the consent of one of his sureties: *held*, that the surety is discharged thereby..... *ib.*

7. But where a co-surety is present and consents to the release of a mortgage on the property of the principal debtor, and that it be sold and applied to the payment of a deficit for which he is bound in a surety bond, he is not thereby released, although his co-surety not consenting and bound *in solido* with him, is released..... *ib.*

8. The laws of the United States requiring the accounting officers to examine and settle the accounts of their debtors at stated periods, is directory and constitutes no part of the contract with the sureties; and a failure to call them to account does not discharge the sureties..... *ib.*

9. When the city Treasurer is re-elected his new bond is for a new contract, and the sureties who sign it cannot avail themselves of a neglect of duty to call the Treasurer to account for defalcations of the past year..... *ib.*

10. Where an obligation is valid as to the principal obligor, the sureties cannot avoid responsibility incurred under it without showing they were deceived and induced to sign it by devices intentionally practised on them..... *ib.*

11. Where notes are put into the hands of a surety to indemnify him against loss on payment of a surety debt, if it is shown that the obligors in said notes were insolvent or became so very soon after, the failure to collect or to pursue them is not imputable to the holder.

Thomas et als. vs. Breedlove et als. 573

12. In cases where a fund has been created or assigned to indemnify the surety the original creditor may in equity cause himself to be paid out of this fund which is the nature of a trust for his benefit.

King vs. Harman's Heirs. 607

13. A bond creditor in chancery has the benefit of all counter bonds or collateral securities given by the principal to the surety..... *ib.*

14. So where A gave his bond of indemnity to B to secure him against his guarantee for C to D, on the failure of C, and B his surety becoming liable on his guarantee to D, and assigning his indemnity bond from A to the creditors of D: *held*, that the latter can recover on it even before actual payment by B..... *ib.*

15. The plaintiff in execution for whose benefit the prison bond is taken is the only person who can control its conditions, and his consent that the debtor be absent only for ten days, forever discharges the surety.

Elkins vs. Zacharie. 646.

TENDER

1. A real tender cannot be made so as to stop interest, unless the legal formalities are pursued; thus, a tender to the plaintiff's attorney at law, is insufficient..... *Mudd vs. Stille's heirs.* 17

TESTAMENT.

1. A will cannot be annulled, or its validity inquired into without making those having an interest arising under it, parties to the suit.

Grubb's Heirs vs. Henderson. 51

2. The formalities required in a will are matters of strict law, and it is null if they are not complied with..... *Gaude vs. Baudoin.* 722

3. If a will under private signature be signed in the presence of three witnesses, and on the next day a supplement is made to the original, signed by the testator and five witnesses, the first proceeding will be laid out of view, and the last considered as legalizing the whole instrument..... *ib.*

4. A foreigner not naturalized, who is *residing* in the parish, has been some years in the United States, and has no other domicile in the state, is a competent witness to a will..... *ib.*

THIRD PARTY.

1. Although between the parties, the error in such a sale might be corrected, it can be regarded with respect to third persons, in no other light than a sale of other property..... *Robeson vs. Robert.* 1

2. The word "third persons" in the article 3315 of the *Louisiana Code*, include all who may be interested in the pecuniary standing or solvency of the person against whom mortgages exist, and consequently it includes creditors of every description who may have dealt with the mortgaging debtor, in good faith, whilst in ignorance of or before the existence of the right claimed by mortgage creditors.

Gilbert vs. His Creditors. 145

TITLE.

1. When two parties are applicants for the purchase of a tract of land from the United States, and the Register permits one of them to purchase,

his title under such a permission will not be disturbed, although the evidence does not satisfactorily prove the decision between them to have been made by a comparison of the proof of their respective pretensions.

Primot vs. Thibodeaux. 10

TRANSFER.

1. The legal transferee has no greater interest than the voluntary one. The 651st article of the *Code of Practice*, does not change the rights, which under law third persons had to resist partial transfers of their debt.

Kelso vs. Beaman. 67

TUTOR.

1. The tutor can, under authority of general administration, collect and sue for if necessary to such collection, debts due to the succession.

Ervin et als. vs. Orillion. 205

2. Tutors, except those by nature, are bound by law to obtain confirmation of their appointment by the judge of probates; to take an oath faithfully to discharge their duties, and to give security. Until a tutor complies with these duties, he can do nothing binding and conclusive on the rights of minors whom he represents..... *Verret et al. vs. Aubert.* 351

3. But a tutor duly appointed, or one on whom the office devolves by operation of law, represents the minors under his charge in all civil suits or acts, and has the administration of their estates.

Poultney's Minors vs. Barrett et al. 493

4. The tutor can, under the authority of the general administration to collect and sue for debts, institute suit in behalf of the minors, for the recovery of a debt due the succession..... *ib.*

VENDOR AND VENDEE.

1. A and B verbally agreed that one might sell any part of the other's land and the other was bound to approve the location; A had sold a certain quantity of B's land, it was held that B might bequeath the same quantity of A's land..... *Brown vs. Frantum.* 39

2. A declaration that the vendee is acquainted with the title, means that he has a knowledge of the title under which his vendor acquired the property, but not that he knows the vendor has divested himself of that title. *ib.*

3. In an action by the vendor against the vendee of real estate, adjudicated at public auction, the plaintiff's request to the defendant that he would comply with the terms of the sale, and the defendant's refusal to do so, is insufficient to put the latter in default..... *Stewart vs. Paulding.* 151

4. The 1787th article of the *Civil Code*, has no relation to the opposition on the part of the vendee to carry into effect the adjudication to him of minor's property, ratified by a family meeting subsequently held, on the ground that the bond of the tutor was not given within two days after the adjudication..... *Cavelier f. w. c. vs. Germain.* 215

5. Persons interested in an estate, are in equity bound to refund to the vendee the price really received for property sold erroneously, as belonging to the estate, but they are not responsible for consequential damages or loss..... *Hurst vs. Hyde, Executor.* 449

6. The purchaser need not wait for eviction before he refuses to pay the price, or complete a sale which may subject him to the odium of a purchaser in bad faith..... *Pontchartrain Rail Road Company vs. Durel.* 481

7. It is of no avail that the vendor can give a good title to all but a very small proportion of the property sold. The buyer must have what he bought and every part of it..... *ib.*

8. Where the vendor sells property at public auction *without title*, to even a small part of it, the vendee to whom the adjudication is made cannot be required to complete the sale and and accept security..... *ib.*

9. The purchaser of property at sheriff's or marshal's sales, is entitled to the sum which he really paid and which must be reimbursed in case of eviction; the consideration thereby having absolutely failed.

Lambeth vs. The Mayor et als. 731

10. Where a purchaser at a marshal's sale is afterwards evicted on the ground that the property was not legally sold, the only injury he sustains is the amount which he paid for the property..... *ib.*

11. Seizing creditors of property sold under execution, are responsible to the purchaser no further than for the re-imbursement of the purchase money..... *ib.*

12. The vendor necessarily warrants against his own acts, and even without a stipulation of warranty is liable for a restitution of the price, unless the purchaser was aware at the time of sale of the danger of eviction, and purchased at his peril..... *Canal Bank et als. vs. Copeland.* 543

VERDICT.

1. A verdict not followed by a judgment has no force for any purpose.

Stetson et al. vs. Le Blanc et al. 266

2. Of all questions, there is perhaps none on which the verdict of a jury is entitled to more weight, than that which relates to the value of waste land in the parish..... *Minoue et al. vs. Thibodeaux's widow et al.* 327

3. A verdict made up from the evidence of the case, not manifestly wrong, will not be disturbed..... *Huset's heirs vs. Lefebvre et als.* 601

WITNESS.

1. An attorney interrogated as a witness in a case upon his *voir dire*, swore "that he had not stipulated any particular fee; but expected to be paid for his legal services, and that it was his habit, when he had not stipulated for his fee to charge less, should he fail in the cause than if he were to succeed, and that he would feel bound by his rule of conduct to ap-

ply it in this case." It was held by the court that he was admissible as a witness for his client.....*Sprigg vs. Beaman.* 59

2. A debtor who is liable in warranty, if the plaintiff succeed against his vendee, has a direct and legal interest, which renders him incompetent to testify in the case..... *ib.*

3. The father-in-law is a competent witness to testify in behalf of his son-in-law.....*Hamblin vs. Hook, administratrix.* 73

4. A witness for plaintiff has no right to refresh his memory by reference to the plaintiff's books, where it does not appear the entries were made by the witness.....*Pargoud vs. Guice, administer, &c.* 75

5. A party to the suit, made a witness by an application to his conscience, cannot complain of being judged by such answers as he chooses to give.....*Robbins, syndic, etc. vs. Leverich et al.* 340

6. Where the question propounded to the defendant, was in substance, whether he received directly or indirectly, the transfer or assignment of a particular debt; the answer which negatives only the transaction directly between the insolvent and the defendant personally, is insufficient. *ib.*

7. A partner is a competent witness for his co-partner in a suit for the recovery of the price of work which was done before the partnership was formed, and when he has no interest in the result of the suit.
Kellar vs. Banks. 527

8. The objection to a partner as a witness for his co-partner in a matter which took place before the existence of the partnership goes to his credibility and not to his competency..... *ib.*

9. A third person named in an act of sale, who stipulates therein to release a mortgage on the property sold, may be called as a witness by the vendee to prove that he had released the mortgage as stipulated, although he never signed the act containing the stipulation.
Syndic of McManus vs. Jewett. 530

10. A foreigner not naturalized, who is residing in the parish, has been some years in the United States, and has no other domicile in the state, is a competent witness to a will.....*Gaude vs. Baudoin.* 722

WORKMEN.

1. The clause of the article 3499 of the *Louisiana Code*, which provides that actions of workmen, laborers and servants, for the payment of their wages, shall be prescribed in one year, does not apply to an action for work done under a specific contract or by the job.
Morrison vs. Leeds. 591

2. Where a person contracts with a workman to build several houses for a certain price payable at fixed periods, and discharges him before the completion of the edifices, and it is in proof the work was well executed, the latter will recover the full amount of his work and labor done as on a *quantum meruit*.....*Joublane vs. Daunoy.* 656